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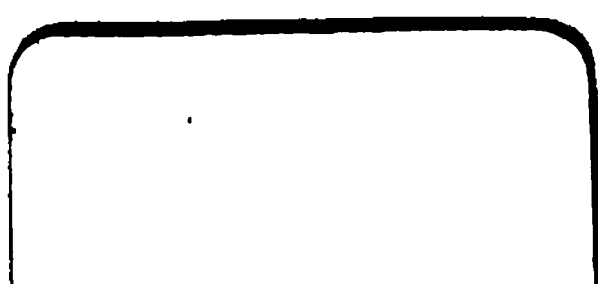
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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

E. C. EBERSOLE,
REPORTER.

VOL. XIX.
BEING VOLUME LXXVII OF THE SERIES

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" JOSEPH M. BECK, Fort Madison,
" GIFFORD S. ROBINSON, Storm Lake,
" CHARLES T. GRANGER, Waukon,
" JOSIAH GIVEN, Des Moines, } JUDGES.

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FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

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TABLE OF CASES

REPORTED IN THIS VOLUME,

A			
Abbey, Walker v.....	702	Bonebrake, Babcock v.....	710
Abernethy, Reid v.....	488	Bowman, National Lumber	
Adams, White v.....	295	Co. v.....	706
Ætna Life Ins. Co. v Hesser.	881	Brannum v. O'Connor.....	682
Albee v. Curtis.....	644	Briggs v. McEwen.....	808
Allison, Batie v.....	818	Bright v. Slocum.....	27
American Mortgage and In-		Buckland v. Shephard.....	829
vestment Co., Gafford v....	786	Bullard, Prouty v.....	42
Anderson, Kilbourn v.	501	Burdette v. Woodworth.....	144
Anderson, Probert v.....	60	Burlington, City of, Perkins v.	558
Anderson v. Union Pac. Ry.		Burlington & Western Ry. Co.,	
Co.....	445	Cox v.....	478
Anderson v. Wyant.....	498	Burtis v. Humboldt County	
Andrews v. Mason City & Ft.		Bank.....	108
D. Ry. Co.....	669	Bush v. Nichols.....	171
Armstrong, Singer v.....	897	Bushnel v. Whitlock.....	285
Arnold v. Wilds.....	598	Butler, Bleckman v.....	128
Auchampaugh v. Schmidt....	18		
B		C	
Babcock v. Bonebrake.....	710	Calkins, McLain v.....	468
Baird v. Boehner.....	622	Carter, Wiley v.....	751
Baker v. First Nat. Bank of		Cassidy v. Woodward.....	854
Davenport.....	615	Cedar Rapids, I. F. & N. W.	
Bartlett v Fireman's Fund		Ry. Co. v. Cowan.....	585
Ins. Co.....	155	Chambliss v. Johnson.....	611
Bartlett v. Iowa State Ins. Co.	86	Cherokee & Dak. Ry. Co. v.	
Batavian Bank, Fort Madison		Renken.....	816
Lumber Co. v.....	898	Chicago, M. & St. P. Ry. Co.,	
Batie v. Allison.....	818	Engle v.....	661
Beattie, Riddle v.....	168	Chicago, M. & St. P. Ry. Co.,	
Belknap v. Belknap.....	71	Milner v.....	755
Bennett, Dalhoff v.....	140	Chicago, M. & St. P. Ry. Co.,	
Bigelow v. Wilson.....	608	Nelson v.....	405
Billings, State v.....	417	Chicago, M. & St. P. Ry. Co.,	
Bills v. Bills.....	179	Seska v.....	187
Bitzer, Joy v.....	73	Chicago, M. & St. P. Ry. Co.,	
Bleckman v. Butler.....	128	State v.....	442
Blumenstein, Jones v.....	861	Chicago, M. & St. P. Ry. Co.,	
Blunt, State v.....	106	Town of Edenville v.....	69
Board of Equalization, Rocka-		Chicago & N. W. Ry. Co., Gal-	
fellow v.....	493	braith v.....	445
Boehner, Baird v.....	622	Chicago & N. W. Ry. Co.,	
		Johnson v.....	666
		Chicago & N. W. Ry. Co.,	
		Meloy v.....	748

Chicago & N. W. Ry. Co., West v.....	654
Chicago, R. I. & P. Ry. Co., Shepard v.....	54
Chicago, St. P. & K. O. Ry. Co., Doyle v.....	607
Chickasaw County, Harris v.	345
City of Burlington, Perkins v.	553
City of Marion Waterworks Co., Mallory v.....	715
City of Vinton, Troxel v....	90
Clark v. Maurer.....	717
Cole v. Green.....	307
Collett, Gleason v.....	448
Collins v. Hills.....	181
Condray v. Stifel.....	288
Cormao v. Western White Bronze Co.....	32
Cosgro, Edwards v.....	428
Coughlin v. Richmond.....	188
Courtright, Lewis v.....	190
Courtright v. Singer Mfg. Co.	317
Cowan, Cedar Rapids, I. F. & N. W. Ry. Co. v.....	535
Cowell, Knapp v.....	528
Cox v. Mason City & Ft. D. Ry. Co.....	20
Cox v. Burlington & Western Ry. Co.....	478
Cruikshank, Flower v.....	110
Curtis, Albee v.....	644
Curtis, Luce v.....	347

D

Dalhoff v. Bennett.....	140
Damon v. Weston.....	259
Daniels, Stanbrough v.....	561
Day v. Hawkeye Ins. Co.....	348
Day Bros., Weiser v.....	25
Deere v. Wolf.....	115
Des Moines Ins. Co., Key v....	174
Des Moines Ins. Co., Welsh v..	376
District Township of Rose Grove, Everts v.....	37
Divilbliss, Read v.....	88
Donnell, Keokuk & N. W. Ry. Co. v.....	221
Doran, Jenswold v.....	692
Doughty, Ridley v.....	226
Doyle v. Chicago, St. P. & K. C. Ry. Co.....	607
Drain v. Jacks.....	629
Drake v. Painter.....	781
Dubuque Printing Co., Saw- yer v.....	242
Dudley v. Minnesota & N. W. Ry. Co.....	408
Dunreath Red-Stone Quarry Co., Wilson v.....	429

E

Edwards v. Cosgro.....	428
Empire Mill Co. v. Lovell....	100
Engle v. Chicago, M. & St. P. Ry. Co.....	661
Evans v. Phelps.....	526
Everts v. District Township of Rose Grove.....	37
Eye v. Tasker.....	48
Eyerly v. Supervisors of Jas- per County.....	470

F

Farley v. O'Malley.....	531
Farmers & Traders' Bank, Meyer v.....	388
Ferguson v. Firmenich Manuf. Co.....	576
Fidelity & Casualty Co., State ex rel. Phillips v.....	648
Finke v. Ziegelmiller.....	251
Fireman's Fund Ins. Co., Bart- lett v.....	155
Firmenich Manuf. Co., Fergu- son v.....	576
First Nat. Bk. of Davenport, Baker v.....	615
First Presbyterian Church v. Logan.....	326
Fisher, Scovil v.....	97
Fisher, Spitzmiller v.....	239
Flower v. Cruikshank.....	110
Forney v. Remey.....	549
Fort Madison Lumber Co. v. Batavian Bank.....	393
Foster, Snyder v.....	638
Francis v. Wallace.....	373
Fuller, Whitton v.....	599

G

Gaar v. Hart.....	597
Gafford v. American Mortgage & Investment Co.....	788
Gaines v. Johnson.....	611
Galbraith v. Chicago & N. W. Ry. Co.....	445
Gallaher, Sperry v.....	107
Garner, Parks v.....	154
Gaverich, Leas v.....	275
Giltrap v. Watters.....	149
Givens, Jones v.....	173
Gleason v. Collett.....	448
Gray v. Nelson.....	63
Gray v. Wolf.....	630
Green, Cole v.....	307
Green Bay Lumber Co. v. Ire- land.....	636
Grousendorf v. Howat.....	187

CASES REPORTED.

7

H

Hairsine, Horsley v.....	141
Hall v. Jackson.....	201
Harris v. Chickasaw County..	845
Hart, Gaar v.....	597
Hawkeye Ins. Co., Day v.....	848
Hawley v. Page.....	289
Head Bros. v. Thompson.....	263
Henning v. Western Assur- ance Co.....	819
Hershey v. Johnson.....	611
Hesser, Aetna Life Ins. Co. v.	881
Hill, Ocheltree v.	721
Hill, Simmons v.....	878
Hills, Collins v.....	181
Hippee v. Pond.....	235
Hoagland, State v.....	185
Home Insurance Co., Zimmer- man v.....	685
Hooper, Sac County Bank v..	485
Horsley v. Hairsine.	141
Hostetter, Otcheck v.....	509
Howat, Grousendorf v.....	187
Huiskamp, Russell v.	727
Hull, Preston v.	809
Humboldt County Bank, Bur- tis v.....	108

I

Iowa State Ins. Co., Bartlett v.....	86
Ireland, Green Bay Lumber Co. v.....	686

J

Jackson, Hall v.....	201
Jacks, Drain v.....	629
Jacobson, McCormick Har- vesting Machine Co. v.....	582
Jenswold v. Doran.....	692
Jenswold v. Rutledge.....	692
Johnson, Chambliss v.....	611
Johnson v. Chicago & N. W. Ry. Co.....	666
Johnson, Gaines v.....	611
Johnson, Hershey v.....	611
Johnson, Reese v.....	611
Jones v. Blumenstein.....	861
Jones v. Givens.....	178
Jones, Wineland v.....	401
Joy v. Bitzer.....	78

K

Kavalier v. Machula.....	121
Kegley, Smith v.....	475
Kennedy, State v.....	208

Keokuk & N. W. Ry. Co. v. Donnell.....	221
Key v. Des Moines Ins. Co....	174
Kilbourn v. Anderson.....	501
Kline, Morgan v.....	681
Knapp v. Cowell.....	528
Knight, Roaf v.....	506
Knight, Smith v.....	540
Kruidenier v. Shields.....	504
Kuhner, State v.....	250

L

Lamp, Toerring v.....	488
Larrison, Reed v.....	899
Leas v. Gaverich.....	275
Lewis v. Courtright.....	190
Lewis, Ver Straeten v.....	180
Logan, First Presbyterian Church v.....	826
Lovell, Empire Mill Co. v....	100
Luce v. Curtis.....	847
Luce v. Moorehead.....	867
Lyons v. VanGorder.....	600

M

Machula, Kavalier v.....	121
Maddux, Romans v.....	203
Mallory v. City of Marion Water Works Co.....	715
Malvern, Town of, Strahan v.	454
Marriage v. Woodruff.....	291
Mason City & Ft. D. Ry. Co., Andrews v.....	669
Mason City & Ft. D. Ry. Co., Cox v.....	20
Mathieson, State v.....	485
Maurer, Clark v.....	717
McArthur, Stewart v.....	162
McCormick Harvesting Ma- chine Co. v. Jacobson.....	582
McCulloch, State v.....	450
McDanel, Thomas v.....	126, 299
McDonough, Spence v.....	460
McEwen, Briggs v.....	808
McKay v. Woodruff.....	418
McKee v. McKee.....	464
McLain v. Calkins.....	468
McMahon v. Travelers' Ins. Co.....	229
Melhop v. Seaton.....	151
Meloy v. Chicago & N. W. Ry. Co.....	748
Merchants & Bankers' Ins. Co., Zimmerman v.....	850
Meyer v. Farmers & Traders' Bank.....	888
Miller v. Root.....	545
Milner v. Chicago, M. & St. P. Ry. Co.....	755

Millsap, Wasson v.....	762	Ridley v. Doughty.....	226
Minneapolis & St. L. Ry. Co., Moody v..	29	Riegelman v. Todd.....	696
Minnesota & N. W. Ry. Co., Dudley v.....	408	Roaf v. Knight.....	506
Moody v. Minneapolis & St. L. Ry. Co.....	29	Robertson, Ward v.....	159
Moore, State v.....	449	Rockafellow v. Board of Equalization.....	498
Moorehead, Luce v.....	867	Roenisch, State v.....	379
Morgan v. Kline.....	681	Rogers, Scott v.....	488
N		Romans v. Maddux.....	208
National Lumber Co. v. Bow- man.....	706	Root, Miller v.....	545
Nelson v. Chicago, M. & St. P. Ry. Co.....	405	Ruiter v. Plate.....	17
Nelson, Gray v.....	63	Russell v. Huiskamp.....	727
Nichols, Bush v.....	171	Rutledge, Jenswold v.....	692
O		S	
O'Brien, Orr v.....	253	Sac County Bank v. Hooper..	485
Ocheltree v. Hill.....	721	Salts, State v.....	193
O'Connor, Brannum v.....	632	Sawyer v. Dubuque Printing Co.....	242
O'Malley, Farley v.....	581	Schmidt, Auchampaugh v....	18
Orr v. O'Brien.....	253	Scott v. Rogers.....	488
Otcheck v. Hostetter.....	509	Scovil v. Fisher.....	97
P		Seaton, Melhop v.....	151
Page, Hawley v.....	239	Seeka v. Chicago, M. & St. P. Ry. Co.....	187
Painter, Drake v.....	731	Shepard v. Chicago, R. L. & P. Ry. Co.....	54
Parks v. Garner.....	154	Shephard, Buckland v.....	329
Peebles v. Peebles.....	11	Shields, Kruidenier v.....	504
Perkins v. City of Burlington	553	Simmons v. Hill.....	378
Phelps, Evans v.....	526	Simpkins, State v.....	676
Pierce, State v.....	245	Singer v. Armstrong.....	397
Plate, Ruiter v.....	17	Singer Manuf. Co., Courtright v.....	317
Pond, Hippee v.....	235	Slocum, Bright v.....	27
Preston v. Hull.....	309	Smith v. Kegley.....	475
Probert v. Anderson.....	60	Smith v. Knight.....	540
Prouty v. Bullard.....	42	Snyder v. Foster.....	638
R		Spence v. McDonough.....	460
Randolf v. Town of Bloomfield	50	Sperry v. Gallaher.....	107
Raynor v. Raynor...	232	Spitzmiller v. Fisher.....	289
Read v. Divilbliss.....	88	Springfield Engine & Thresher Co. v. Van Brunt.....	82
Reed v. Larrison.....	899	Stanbrough v. Daniels.....	561
Reese v. Johnson.....	611	Stanhope v. Swafford.....	594
Reid v. Albernethy.....	438	State v. Billings.....	417
Remey, Forney v.....	549	State v. Blunt.....	106
Renken, Cherokee & Dak. Ry. Co. v.....	816	State v. Chicago, M. & St. P. Ry. Co.....	442
Ressegieu v. VanWagenen...	351	State v. Hougland.....	135
Richman v. Supervisors of Mus- catine County.....	513	State v. Kennedy.....	208
Richmond, Coughlin v.....	188	State v. Kuhner.....	250
Richmond v. Sundburg.....	255	State v. Mathieson... ..	485
Riddle v. Beattie.....	168	State v. McCulloch.....	450
		State v. Moore.....	449
		State v. Pierce.....	245
		State v. Roenisch.....	379
		State v. Salts.....	193
		State v. Simpkins.....	676
		State v. Turney.....	269

State v. Whitmer.....	557
State ex rel. Phillips v. Fidelity & Casualty Co.....	648
Stewart v. McArthur.....	162
Stickney v. Stickney.....	699
Stifel, Condray v.....	283
Strahan v. Town of Malvern..	454
Sundburg, Richmond v.....	255
Supervisors of Jasper County, Eyerly v.....	470
Supervisors of Muscatine County, Richman v.....	518
Swafford, Stanhope v.....	594

T

Tasker, Eye v.....	48
Thomas v. McDaneld....	126, 299
Thompson, Head Bros. v.....	263
Todd, Riegelman v.....	696
Toerring v. Lamp.....	488
Town of Bloomfield, Randolph v.....	50
Town of Edenville v. Chicago, M. & St. P. Ry. Co.....	69
Town of Malvern, Strahan v.	454
Travelers' Ins. Co., McMahon v.....	229
Troxel v. City of Vinton.....	90
Turney, State v.....	269

U

Union Pac. Ry. Co., Anderson v.....	445
-------------------------------------	-----

V

Van Brunt v. Springfield Engine & Thresher Co.....	82
Van Gorder, Lyons v.....	600
Van Wagenen, Ressegien v..	351
Ver Straeten v. Lewis.....	180
Vinton, City of, Troxel v.....	90

W

Walker v. Abbey.....	702
Wallace, Francis v.....	378

Ward v. Robertson.....	159
Ward, West v.....	323
Wasson v. Millsap.....	762
Watters, Giltrap v.....	149
Weiser v. Day Bros.....	25
Welsh v. Des Moines Ins. Co..	376
Wescott, Williams v.....	332
West v. Chicago & N. W. Ry. Co.....	654
West v. Ward.....	323
Western Assurance Co., Henning v	319
Western White Bronze Co., Cormac v.....	82
Weston, Damon v.....	259
White v. Adams.....	295
Whitlock, Bushnel v.....	285
Whitmer, State v.....	557
Whitton v. Fuller.....	599
Wilds, Arnold v.....	598
Wilds, Wise v.....	586
Wiley v. Carter.....	751
Williams v. Wescott.....	332
Wilson, Bigelow v.....	608
Wilson v. Dunreath Red-Stone Quarry Co.....	429
Wilson v. Yocum.....	569
Wineland v. Jones.....	401
Wise v. Wilds.....	586
Wolf, Deere v.....	115
Wolf, Gray v.....	630
Woodruff, Marriage v.....	291
Woodruff, McKay v.....	413
Woodward, Cassidy v.....	854
Woodworth, Burdette v.....	144
Wyant, Anderson v.....	498

Y

Yocum, Wilson v.....	569
----------------------	-----

Z

Zeigelmiller, Finke v.....	251
Zimmerman v. Home Insurance Co.....	685
Zimmerman v. Merchants & Bankers' Ins. Co.....	350

REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DES MOINES, JANUARY TERM, A. D. 1889.
IN THE FORTY-THIRD YEAR OF THE STATE.

PRESENT:

HON. JOSEPH R. REED, CHIEF JUSTICE.	
HON. JAMES H. ROTHROCK,	}
HON. JOSEPH M. BECK,	
HON. GIFFORD S. ROBINSON,	
HON. CHARLES T. GRANGER,	
	JUSTICES.

PEEBLES V. PEEBLES *et al.*

New Trial: DISCRETION OF TRIAL COURT. An order granting a new trial will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion in granting it.

Appeal from Monroe District Court.—HON. DELL STUART, Judge.

FILED, JANUARY 24, 1889.

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92	213
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123	58
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134	727

THIS is an action in equity for the partition of certain real estate. There was a decree for the plaintiff. A motion for a new trial was sustained, and plaintiff appeals.

H. L. Dashiell, for appellant.

Mabry & Morrison and *James Coen*, for appellees.

ROTHROCK, J.—It is very seldom that we are required to determine an appeal taken from an order granting a new trial. In the case of *McKay v. Thorington*, 15 Iowa, 29, it was said that “it is a constant practice in this court, as in all other appellate tribunals, to refuse to disturb such rulings when a new trial is granted, and when we would have done the same thing if it had been refused. And this upon the principle that a discretion is wisely lodged in such cases with the judge trying the case, which should not be controlled, except in a clear case of its abuse.” Applying this rule to this case, we see no sufficient reason for not allowing the court below to examine this case again. The refusal to grant new trials is the source of appeals to this court, and our reports show thousands of reversals where new trials have been refused when they ought to have been granted.

It is true that in this case the motion for a new trial is probably not formally within the rules prescribed for such motions ; but these rules have usually been applied where a new trial has been refused. It is recited in the abstract that when the cause was tried it was submitted to the court “on the pleadings and evidence and the arguments of counsel.” But there is no evidence in the abstract, and no statement as to what the evidence tended to prove. The court, in an opinion filed in the case, appears to have thought that a new trial should be had to determine whether the plaintiff, under all the facts and circumstances, was vested with any interest in the land.

Auchampaugh v. Schmidt.

We have not thought it necessary to set out the respective claims of the parties touching the title of the land in controversy. To do so would probably involve a determination of questions which will more properly come up for consideration upon an amendment of the pleadings and upon the evidence in the case. What we are required to determine is whether the court abused its discretion in ordering a new trial. We are united in the opinion that it did not.

AFFIRMED.

AUCHAMPAUGH V. SCHMIDT.

1. **Surety: DISCHARGE: AGREEMENT TO LOOK TO PRINCIPAL ALONE: CONSIDERATION: ESTOPPEL.** Defendant, as surety for L., signed the note in question, and the payee knew that defendant was only a surety. The parties then all lived in Illinois. After the maturity of the note, defendant was about to remove to Iowa, and, at his request, his wife called on the payee of the note and requested him to release defendant from liability thereon, and he then promised to look to L. alone for payment, and stated that defendant need give himself no further concern about it. This promise was communicated to defendant, and he heard nothing further about it until some eight years afterwards. At that time L. had an abundance of property, but is now insolvent. *Held*, that these facts did not discharge defendant from liability on the ground of an estoppel, because the payee made no statement or representation as to existing facts, but a mere promise as to the future; and that the promise did not discharge him, because it was without any consideration.
2. **Witness: COMPETENCY: PERSONAL TRANSACTION WITH DECEDENT.** In an action by an administrator against one of the joint makers of a promissory note given to his intestate, the wife of the defendant was a competent witness on behalf of defendant, under section 3641 of the Code, to prove that he signed the note as surety only. (*Auchampaugh v. Schmidt*, 72 Iowa, 656, *overruled*.)

Appeal from Buchanan District Court.—HON. J. J. NEY, Judge.

FILED, JANUARY 24, 1889.

77	13
80	187
77	13
98	514
77	13
105	556
77	13
106	587
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115	244

ACTION on a promissory note. The defenses pleaded are: (1) That defendant is surety on the note, and that plaintiff's intestate had neglected to institute suit thereon against the principal maker, and that the action against him is now barred by the statute of limitations of the state of Illinois, where he resides, whereby defendant was discharged; and (2) that after the maturity of the note, and when defendant was about to remove to this state, the intestate released defendant from liability, and promised to look alone to the principal for payment; the principal then being solvent, and being now insolvent. No question arose on the trial under the first defense, and it was not submitted to the jury. On the second defense there was a verdict for defendant on which the district court entered judgment. Plaintiff appeals.

E. E. Hasner, for appellant.

Woodward & Cook, for appellee.

REED, C. J.—The verdict determines the following facts: Defendant signed the note as surety for Charles

1. **SURETY:** discharge: agreement to look to principal alone: consideration: estoppel. Leopold, the other maker, and the fact of his suretyship was known to the payee, plaintiff's intestate, when he accepted it. At that time the parties all resided in Illi-

nois. After the maturity of the note defendant was about to remove to this state, and, at his request, his wife called on the holder of the note, and requested him to release defendant from liability thereon, and he then promised to look alone to Leopold for payment, and stated that defendant need give himself no further concern about it. This promise was communicated to defendant, and he heard nothing further concerning the matter until after the death of the holder of the note, which occurred some eight years afterwards. At that time Leopold had abundance of property out of which the debt could have been made, but is now insolvent. The principal question in the case is whether, upon this state of facts, defendant is discharged from liability.

Auchampaugh v. Schmidt.

It is well settled that if the creditor makes any representation to the surety as to the condition of the indebtedness, as that it has been paid by the principal, and he is induced thereby to change his situation with reference to it, he is thereby discharged. Brandt, Sur., sec. 211; *Thornburgh v. Madren*, 33 Iowa, 380. The rule in that respect is founded on the equitable doctrine of estoppel. In the case in 33 Iowa the surety was about to give the notice prescribed by the statute (Code, sec. 2108) to require the creditor to sue on the note, and was informed by the creditor that the principal had paid the debt; and, relying upon that statement, he omitted to give the notice. The debt had not in fact been paid, and suit was afterwards brought on the note against the surety, the principal in the meantime having been adjudged a bankrupt and received his discharge. It was held that, as the creditor had misled the surety to his injury by the statement that the debt was paid, he would not afterwards, as against him, be permitted to affirm its falsity.

It may also be regarded as settled that if the creditor promises to look alone to the principal for payment, and the surety, in reliance on that promise, either surrenders securities held for his indemnity, or is induced to omit to procure security, or otherwise changes his position with reference to the principal, he is thereby discharged. *Harris v. Brooks*, 21 Pick. 195; *Bank v. Haskell*, 51 N. H. 116; *Whitaker v. Kirby*, 54 Ga. 277. This holding is upon the ground that what has been done amounts to a valid agreement for the discharge of the surety, the promise of the creditor having for its support as a consideration what was done by the surety in reliance upon it.

The facts of the present case, however, do not bring it within either of the rules. The transaction lacked the elements essential to constitute an estoppel. There was no statement or representation as to existing facts, but a mere promise as to future actions. To constitute an estoppel there must have been a representation as to some fact upon which the party has relied and acted, so

as to change his condition with reference to the subject, and it does not arise upon a mere promise as to future actions. It also lacked the essential element of a contract.

There was no claim that defendant ever held any security for his indemnity against liability, nor was there any pretense that he contemplated procuring such security when he made the request to be released, and was induced by the promise to omit to procure it. In every respect his relation to Leopold continued the same after as before the promise was made. The promise, then, was *nudum pactum*. Intestate gained no advantage by it, and defendant suffered no loss or inconvenience from it. His liability on the note was in no manner affected by it, but an action for its enforcement might have been maintained the next hour or the next day, as well as before the promise was made. As the contract continued in force, it is manifest that his liability would continue until terminated by some subsequent act of the parties, or by operation of law; but no act having that effect was ever done. As the liability existed when Leopold became insolvent, that circumstance has no effect different from what it would have had if it had occurred before the promise was made.

When the evidence was closed, plaintiff moved the court to direct a verdict for him. We think the court erred in overruling that motion; for, while there was some conflict in the evidence, that given by defendant tended to prove only the state of facts enumerated above.

The case has twice before been in this court. On the first appeal (70 Iowa, 642), it was held that, if the action for the enforcement of the note against Leopold was barred by the statute of Illinois, it was also barred as against defendant. As stated above, that question was not submitted to the jury, and we assume that it has since been ascertained that the action was not barred as against Leopold, although that is not shown by the record.

Ruiter v. Plate.

On the second appeal (72 Iowa, 656), it was held that defendant's wife was not a competent witness as against the administrator, on the question of suretyship. The same witness was examined upon the last trial on the same question, but error was not assigned on the ruling admitting her testimony. We deem it proper, however, to say that our holding on the question is manifestly wrong. The witness testified to an alleged transaction between deceased and her husband, at which she claimed to have been present, and not to a transaction between deceased and herself. It is as to transactions and communications between the witness and deceased that she is disqualified to testify by Code, section 3639. As to the transaction between deceased and her husband she is a competent witness under section 3641. It is doubtless a hardship on defendant that he should be required to pay the debt, but he assumed liability for it when he signed the note. He is but paying the penalty which all men incur when they assume the relation of suretyship for others. The judgment will be

REVERSED.

RUITER V. PLATE *et al.*

1. **Appeal: JURISDICTION: AMOUNT IN CONTROVERSY.** In an action of replevin the petition alleged that the value of the property was one hundred dollars, and that plaintiff had sustained damages by reason of its detention in the sum of twenty-five dollars. The prayer of the petition is for the delivery of the property, or for its value, if it cannot be found, and for damages and costs. *Held* that the amount in controversy was more than one hundred dollars, and that this court had jurisdiction of the appeal without a certificate from the trial judge.

VOL. 77—2

77	17
98	506
77	17
130	281

3. **Replevin:** WHEN DEMAND NOT NECESSARY AS CONDITION TO ACTION. Where a petition in replevin stated that defendant, under a chattel mortgage, which was void, took the mortgaged property against plaintiff's protest and opposition, amounting almost to actual resistance,—the property being the same as that sought to be recovered in the action,—*held* that it was error to order a verdict for defendant because there was no allegation of a prior demand, for, if the allegations were true, the taking was wrongful, and no demand was necessary.

Appeal from Sioux District Court.—HON. S. M. LADD,
Judge.

FILED, JANUARY 24, 1889.

ACTION to recover the possession of five hundred bushels of oats, of the alleged value of one hundred dollars. Upon the submission of all the evidence on the part of the plaintiff, the court instructed the jury to return a verdict for defendants. A verdict was returned in accordance with the instruction, and from the judgment rendered thereon the plaintiff appeals.

George W. Hewitt, for appellant.

W. S. Palmer, for appellees.

ROBINSON, J.—In June, 1887, the plaintiff purchased of defendant and Carver a horse, in part payment for which he gave a note for eighty-five dollars, and a chattel mortgage on the oats in controversy to secure the same. The horse died a few days after it was purchased. On a subsequent date defendant Plate, as the agent of Carver, seized and removed the oats under the chattel mortgage. Plaintiff asks judgment for the oats, or their value, and for his damages. He alleges that the contract of purchase included a warranty that the horse was sound and good for general farm purposes; that the horse was in fact unsound and worthless; that there was a total failure of the consideration of the mortgage, and, as a consequence, the mortgage is invalid; and that the oats were taken by Plate forcibly, without the consent and contrary to the directions of plaintiff. The

Ruiter v. Plate.

evidence tends to support these claims of plaintiff. The court instructed the jury to return a verdict for defendants, on the ground that no demand by plaintiff for the return of the oats prior to the bringing of this action was proven.

I. Appellee contends that the amount in controversy is not sufficient to give this court jurisdiction of this case without a certificate of the trial judge, and, since such a certificate was not given, that the case must be dismissed. The petition alleges that the value of the property in controversy was one hundred dollars; that plaintiff has sustained damages by reason of its detention in the sum of twenty-five dollars. The prayer of the petition is for the delivery to him of the property, or for the value thereof, if it can be found, and for damages and costs. The averments of the petition and the prayer for judgment, together, show with certainty the amount in controversy, and that it is more than one hundred dollars. We think that is sufficient to give this court jurisdiction under section 3173 of the Code. The amount in controversy, as shown by the pleadings, does not appear to have been diminished by any waiver of plaintiff.

II. It is contended by appellees, and was intimated by the court below, that a demand for the return of the oats was necessary before the right of recovery of plaintiff became complete. Whether such a demand was necessary or not depends upon the facts of the case. As a rule, the law does not require useless acts. It was said in *Smith v. McLean*, 24 Iowa, 325, that proof of demand of possession will be required at the trial only where it is necessary to terminate the defendant's right of possession, or confer on plaintiff that right, and that to require such proof in other cases would be to impose a vain and useless labor. See, also, *Jones v. Clark*, 37 Iowa, 391, and cases therein cited; 5 Amer. & Eng. Cyclop. Law, 528*h*, 528*i*, and notes. In this case the evidence tends to show that when Plate took the oats they were in a granary which belonged to plaintiff, and

1. APPEAL: jurisdiction: amount in controversy.

2. REPLEVIN: when demand not necessary as condition to action.

Cox v. Mason City & Ft. D. Ry. Co.

which was locked; that plaintiff refused to allow defendants to take the oats, and forbade their removal; that he opposed such removal almost to the extent of actual resistance; that Plate, in order to take possession, forced the granary locks, and took the oats, contrary to the expressed and known will of plaintiff. Under these circumstances, if the mortgage under which Plate was acting was in fact void, the taking of the oats was wrongful. *State v. Boynton*, 75 Iowa, 753. A demand for the return of the property in such a case would be an idle form. If defendants had taken possession of the property without notice of the claims of plaintiff in regard to the mortgage, a different question might arise. It is claimed by appellees that the mortgage by its terms gave to them the possession of the property. It in terms gave the mortgagee the right to take such possessions, but, if the claim of appellant in regard to the mortgage be true, it was invalid, and could not be made the basis of a claim of possession.

III. In view of the conclusion we have stated, other questions presented by counsel are not material, and will not be determined. For the error of the court in instructing the jury to return a verdict for defendants, its judgment is

REVERSED.

COX V. THE MASON CITY & FORT DODGE RAILWAY COMPANY.

1. **Appeal: ABSTRACT NOT DENIED DEEMED TRUE.** An amendment to appellant's abstract, filed by appellee, will be taken as true if not denied.
2. **Railroads: RIGHT OF WAY: APPLICATION FOR APPRAISEMENT: CONSTRUCTION.** Plaintiff's application to the sheriff to appraise his damages for right of way taken by the defendant for its road did not ask for the assessment of his damages to the particular lots named, but for the assessment of his damages to his lots, caused by the location of the road across particular lots, describing them. He owned all the lots in the block, but the road was located over a part of them only,—those particularly described. *Held* that the form of the application did not limit his claim to the damages to the lots particularly described. (*Waltemeyer v. Wisconsin, I. & N. Ry. Co.*, 71 Iowa, 626, distinguished.)

77	20
78	134
77	20
88	445

77	20
91	390

77	20
108	60

77	20
118	492

77	20
115	111

77	20
116	38

Cox v. Mason City & Ft. D. Ry. Co.

8. ———: ———: LOTS IN BLOCK OWNED BY PLAINTIFF: DAMAGES. Where all the town lots in a block were owned by plaintiff, and defendant located its road over some of them only, plaintiff was not limited in his recovery to the damage to the lots touched by the right of way, but was entitled to prove and recover the damage to the whole block. [REED, C. J., *dissenting*.]
4. Costs: APPORTIONMENT ON APPEAL. This court cannot hear a complaint that the costs were all taxed by the trial court to appellant when they should have been apportioned, where no motion or request of that kind was made below.

Appeal from Wright District Court.—HON. S. M. WEAVER, Judge.

FILED, JANUARY 24, 1889.

THE plaintiff is the owner of the north half of block 9 in Cox's First addition, and all of block 10 in Cox's Second addition, to Eagle Grove Junction, in Wright county. The defendant's road is located across and touches lots 4, 5 and 6, in the north half of block 9, and lots 1, 2, 3, 4, 7, 8, 9, 10 and 11, in block 10. Proceedings were instituted by the plaintiff, by which a sheriff's jury was impaneled, and the damages for the location of the road assessed at \$672.50. The defendant appealed to the district court, where the cause was tried by a jury, and the damage assessed at six hundred and sixty dollars, and the defendant again appeals.

Cook & Filkins, for appellant.

Pillsbury, Moats & Moats, for appellee.

GRANGER, J.—I. A motion is filed by appellee to strike from the abstract the record of a certain condemnation proceeding, and he presents an amended abstract, denying that they constitute any part of the record in the case.

1. APPEAL: abstract not denied deemed true.

Cox v. Mason City & Ft. D. Ry. Co.

This additional abstract is undenied by appellants, and, following the case of *Kearney v. Ferguson*, 50 Iowa, 72, the motion must be sustained.

II. The first error assigned relates to the admission of certain testimony touching the measure of damages, and to the clear understanding of the question it will be unnecessary to set out in detail any part of the evidence given or offered. The north half of block 9 and block 10 were separated by a street or alley. The land in each of the blocks, as described, lay in a body, except that it was platted into lots for sale, and was a part of the town-site. The plaintiff, to establish his damage in consequence of the location of the road, offered evidence to show the value of block 10 before and after the location of the road, and the same of the half of block 9. The defendant objected to the testimony in each case on the ground that in each tract there were lots not crossed or touched by the right of way, and that the testimony was irrelevant and immaterial.

It is urged that the plaintiff, in his notice to the sheriff to summon a jury to assess the damages, only asked an award on lots actually taken or touched by the right of way, and that for this reason the proceedings should be limited to the particular lots. Without expressing an opinion as to the legal effect of such a notice, we think, as disclosed by the abstract, it is of a different import. It does not ask for a jury to assess damages to the particular lots named, but does ask for a jury to assess the damage to his lots, caused by the location of the road across the particular lots, designating them by number. The following is the language of the abstract: "An application to have the damages assessed on his lots, caused by the defendant, the Mason City and Fort Dodge Railroad Company, running through and upon the following real estate, of which he is the owner." This would hardly be the natural language used if he sought damage only to the designated lots. We think a fair interpretation is that he designated

2. RAILROADS :
right of way :
application
for appraise-
ment : con-
struction.

Cox v. Mason City & Ft. D. Ry. Co.

certain lots of his as crossed by the right of way, and asked the assessment of legal damage resulting therefrom. The case of *Waltemeyer v. Wis., I. & N. Ry. Co.*, 71 Iowa, 626, is very different in principle. That was an ordinary action in court for damage caused by the company going outside of its right of way, and taking the plaintiff's land. He alleged in his petition damage to one hundred and sixty acres, and upon the trial sought and was permitted to prove the damage per acre to two hundred and forty acres, that being the extent of his farm. The court rightfully held it error, upon the theory that he brought his action for damage to one hundred and sixty acres, and should be limited thereto.

Upon the question of the right of plaintiff to recover damage to lots other than those touched by the right of way, we are referred to several authorities in this state, but to none where the question is as to damage to town lots, as in this case. As to farm lands, the law is well settled, and the owner of lands is not limited in his right of recovery to the subdivision of land crossed or touched by the right of way, but the entire farm, of whatever size, if in one tract, or so lying that it is used as one farm, may be considered. In such cases the question is, how is the value of the farm affected by the construction of the road across it? and to the extent that it is lessened in value, the owner is entitled to recover. Accepting this as the rule in such cases, we are led to the query, wherein does the case at bar differ? Take block number 10, across which defendant's road passes. The lots composing the block may be considered as on the market. It is one body of land, owned by one person. In the case of farm lands, where four forties constitute a tract, and one forty is crossed by the road, we inquire, in assessing the damage, what was the value of the entire tract before the location of the road? and then, how much less is it worth after the location? and the difference is the measure of damage. It is just compensation; being one piece or parcel of property, its entire

3. —: —:
 lots in block
 owned by
 plaintiff:
 damages.

depreciation is measured. Now, with the block of lots we are unable to mark a distinction. It is as clearly one piece or parcel of property. The taking of one or two lots, or parts thereof, for railroad purposes, may materially lessen the value of the rest. Whether or not it would is, of course, not a question of law, but of fact. Admitting that it would, it becomes a question of law, and the exact case before us ; for here the question of fact is established by due inquiry. It seems to us that a rule of law that would say to the owner of the block, "Your measure of damage is limited to the particular lots touched by the right of way," without reference to the remaining lots in the block, would be to make a "distinction without a difference." We hold that there was no error in the admission of the testimony.

III. Error is assigned to the giving of certain instructions by the court, and the refusal of some asked by appellant. One given by the court, to which exception was taken, was in exact harmony with the rule adopted as to the admission of testimony, which we approve, and hence, of course, we approve the instruction. One asked by appellant announced an exactly opposite rule, and was rightly refused. The remaining errors assigned, as to giving and refusing instructions, are not argued, and we do not consider them.

IV. The court below taxed the costs to the defendant, and error is assigned in that respect. Appellant insists that there should have been an
4. Costs: apportionment on appeal. apportionment of the costs. This would, in no event, be a reversible error, and with the present state of the record we cannot interfere with the order. The record shows that the court ordered judgment against the defendant for the "costs herein, taxed at \$——, to which the defendant excepted." The court was not asked to make an apportionment, and until its attention is called thereto, and a request refused, we cannot interfere.

AFFIRMED.

Weiser v. Day Bros.

REED, C. J., (*dissenting.*)—In my opinion each lot should be regarded as a separate tract or parcel of real estate. They are so treated in all ordinary dealings, and the law so regards them. Plaintiff was entitled to be compensated for the damage to the lots touched by the right of way, but as to the others the injury is the same as that sustained by other proprietors whose property is similarly situated. If he had not owned any of the lots touched by the right of way, but had owned the others, no one would contend that he was entitled to be compensated for the injury to them, and I know of no principle upon which he is entitled to be compensated for that injury, simply because he happens to own those lots, a part of which was taken.

WEISER V. DAY BROS. *et al.*

77	25
85	96
77	25
88	63
77	25
101	517

Appeal: FROM "DECISION" OF COURT: NOTICE MUST BE SPECIFIC. An appeal to this court may be general,—from all judgments and decisions of the case from which appeals may be taken, or it may be specific—from a particular judgment or decision; and the notice of appeal must state from what the appeal is taken,—whether from the whole case, or some specific part thereof, naming it. And in this case, where the notice stated that the appeal was taken from "the decision" of the district court at a given term, *held* that the word "decision" meant an adjudication other than a final decision; and since there were many such decisions, it is impossible to say which one was meant, and therefore the appeal must be dismissed.

Appeal from Winneshiek District Court.—HON. C. F. GRANGER, Judge.

FILED, JANUARY 25, 1889

ACTION upon a promissory note. The case was tried to a jury, and a judgment had for plaintiff upon direction of the district court. Defendants appeal.

Levi Bullis, for appellants.

Willett & Willett and *Walter E. Akers*, for appellee.

BECK, J.—An amended abstract, which is not denied, shows that the notice of appeal discloses that defendant appeals from the decision of the district court made at an adjourned term in November, 1887. Appeals may be taken to this court from judgments and decisions of the district court. Code, sec. 3163. A judgment is a final adjudication of the rights of the parties. *Id.*, sec. 2849. A decision is an adjudication of a question submitted to the court. It may be of intermediate matters, or it may be of questions finally disposing of the case. From all decisions involving the merits and materially affecting the final judgment appeals may be taken; and a decision affecting a substantial right and other decisions specified may be appealed from. *Id.*, sec. 3164. But many decisions made in a case cannot be appealed from. An appeal is taken by service of a notice stating the appeal from the case, or from some specific part thereof. *Id.*, sec. 3178. It appears that an appeal may be general, from all judgments and decisions of the case from which appeals may be taken, or it may be specific, from a particular judgment or or decision. In the case before us it is not general, for it is from “the decision” at a certain term, and it is not from a final decision and judgment. We cannot hold that the appeal is from the final judgment. The language of the notice does not so declare, and will not bear an interpretation to that effect.

The word “decision” used in the notice means an adjudication other than a final decision. But there

Bright v. Slocum.

were many decisions of that character. Appellants have failed to indicate in their notice what decision they appeal from. We cannot say that they appeal from all decisions. The notice of appeal is fatally defective. Plaintiff's motion to dismiss the appeal must therefore be sustained. **DISMISSED.**

BRIGHT V. SLOCUM *et al.*

Tax Sale and Deed: PRIOR PAYMENT OF TAXES: EVIDENCE: PRESUMPTION. Plaintiff, in order to show that, prior to the sale of his lot for taxes, he had paid the very tax for which it was sold, proved that he had applied to the treasurer for a statement of the taxes due on all his property, consisting of more than one hundred lots, and that, upon receiving his report, he sent by express the amount of money indicated to pay all the taxes. He also produced a tax receipt, showing the payment of the tax on the lot in question, together with five other lots. But the stub of the receipt, which remained in the treasurer's office, showed payment on five of the lots only, omitting the one in question. *Held* that the stub, being a mere memorandum, could not overcome the receipt; also, that it was more rational to presume that the treasurer made a mistake in omitting the lot from the stub, than that he neglected to apply the money sent by plaintiff to the purpose for which it was intended.

Appeal from Cerro Gordo District Court.—HON. G. W. RUDDICK, Judge.

FILED, JANUARY 25, 1889.

ACTION in chancery to set aside a tax sale and deed, and to quiet in plaintiff the title to the land conveyed by the deed. Upon a trial on the merits plaintiff's petition was dismissed. He now appeals to this court.

Adams & Matthews, for appellant.

Glass & Hughes, for appellees.

BECK, J.—I. The ground upon which plaintiff bases his right to the relief prayed for is that the taxes for which the land was sold were, before the sale, actually paid by plaintiff. In support of this claim he produces a tax receipt showing the payment of the taxes upon the lot in controversy and more than one hundred other lots. He testifies that he was informed by the treasurer of the county of the amount of the taxes due on all of his property. He therefore sent by express the amount of money thus indicated to the treasurer of the county, addressing the package to the officer without giving his name. The tax receipt was issued January 9. It appears that a new treasurer entered upon the discharge of the duties of the office, January 1. The money sent by express was received by the treasurer who was the predecessor of the officer signing the receipt, who paid it to his successor. Thus far the evidence of payment is full and satisfactory, leaving no question in the mind as to the payment.

II. But the defendant shows in contradiction of this evidence that the stub of the tax receipt shows that payment was not made on the lot in controversy. It also appears that the footing of the values of six lots, including this lot, which are put together, does not include its value. There is no other evidence tending to contradict the tax receipt. The omission of the description of the lot from the stub of the tax receipt surely cannot overcome the tax receipt. If a mistake is to be presumed, it must rather be taken to have occurred in the stub. It is but a memorandum of the receipt, and is not more satisfactory evidence than the receipt itself. So the amount of the aggregate value of the lot with five others cannot contradict the receipt. It is more rational to suppose a mistake in this aggregate value than in the receipt.

III. Many considerations and legal presumptions other than the evidence referred to sustain the conclusion that the taxes were actually paid. Plaintiff applied to the treasurer for the amount of taxes due on his lots.

 Moody v. Minneapolis & St. L. Ry. Co.

The treasurer's tax-books showed what lots were owned by plaintiff. The treasurer made report to the plaintiff. We will presume that this report was truthful. Plaintiff acted on it, and sent the money required. It was received, and it will be presumed, in the absence of proof to the contrary, that it was rightly applied. It is not rational to suppose that the treasurer should withhold payment on one out of more than one hundred lots. We must presume dishonesty and fraud, to hold that he did. It is more rational to presume that the omission of the lot from the stub of the receipt was the result of mistake. We concur in the conclusion that the evidence satisfactorily shows the payment of the taxes.

Plaintiff offers to pay into court whatever sum is required to redeem from the tax sale, and to pay all taxes due on the land. The cause will be remanded to the court below for a decree setting aside the tax deed, and granting other relief prayed for by plaintiff, and settling the amount required to redeem from the taxes and the tax sale.

REVERSED.

MOODY V. THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY.

Railroads: COW KILLED ON TRACK: WILFUL ACT OF OWNER: CODE, SEC. 1289. Plaintiff's cow, being at large, was on defendant's unfenced track. Defendant's employees on an approaching train rang the bell, sounded the whistle, applied the brakes, and did all in their power to stop the train and prevent a collision with the cow, but were unable to do so. Plaintiff was present and saw the condition of things, and had the time and ability to drive the cow from the track, and thus prevent the collision and the consequent death of the cow, but he made no effort to do so. *Held*, that the death of the cow was "occasioned by the wilful act of the owner" within the meaning of section 1289 of the Code, and that he could not recover of the company.

Appeal from Boone District Court.—HON. JOHN L. STEVENS, Judge.

FILED, JANUARY 25, 1889.

77	29
93	564
77	29
93	231
77	29
114	500

ACTION to recover double the value of a cow, which was killed by defendant in the operation of its railway, at a point where it had the right to fence its track, but where it had neglected to maintain a fence. Judgment for plaintiff. Defendant appeals.

Albert E. Clarke, for appellant.

Robert A. Lowry, for appellee.

REED, C. J.—The cause came into this court on the following certificate of the trial judge: “Plaintiff’s cow, being at large in the vicinity of defendant’s unfenced track, strayed upon the track. Defendant’s employes rang the bell, sounded the whistle, applied the brakes, and did all in their power to stop the train, but failed to stop the train, before it struck the cow. Plaintiff, being present, and having the ability to prevent the accident by driving the cow from the track, and having ample time to do so, (speed having been reduced to about two miles per hour), wilfully neglected and refused to take any steps or to do any act to drive said cow from the track, and wilfully permitted the cow to remain on defendant’s track, in front of the engine, and to be run down thereby, and said cow was run down and killed, without fault or negligence on part of defendant’s employes in charge of the train. *First Question.* Was the plaintiff’s loss due to his wilful act, within the meaning of section 1289 of the Code, which prevents recovery when the loss is occasioned by the wilful act of the owner of stock killed? *Second Question.* Does section 1289 operate to make a railroad company absolutely liable for the value of the stock killed by reason of the want of a fence, in cases where the owner had the power to prevent the injury, but wilfully refused to exercise such power?”

That portion of section 1289 necessary to be considered in determining the questions certified is as follows: “Any corporation operating a railway, that fails

Moody v. Minneapolis & St. L. Ry. Co.

to fence the same against live stock running at large at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, *unless the same was occasioned by the wilful act of the owner or his agent.*" Many causes arising under this provision have been adjudicated in this court. In *Krebs v. Minneapolis & St. L. Ry. Co.*, 64 Iowa, 670, a construction was given to the clause printed above in italics. It was held that the language of the provision implies something more than mere negligence on the part of the owner of the stock, and that to defeat a recovery he must have been guilty of some act immediately connected with the injury; such as driving the stock upon the track, or the like. Merely permitting it to run at large in violation of a police regulation, or pasturing it upon lands adjoining the unfenced track with knowledge of the danger to which it would be exposed, does not have that effect. But in the present case plaintiff knew that his animal had gone upon the track, and had the opportunity and power to prevent the injury, but wilfully refused to exercise that power. He knew of the efforts made by the train-men to prevent the collision, but wilfully refused to do anything to aid them, although he had the ability to prevent it. His act, it appears to us, should be regarded as a wilful act, "connected with the injury," and contributing to it. It does not differ in degree merely from the act of grazing his stock upon lands adjoining the unfenced track, but it is of a different quality. It was not an act of negligence merely, but was a positive wrong. The statute was intended for the protection of the persons and property carried upon railways from the dangers incident to collisions with stock upon the track, as well as to afford the owners of animals killed or damaged thereby a remedy for the injury. The act of standing by and wilfully refusing to make any effort to prevent such an injury, when by reasonable effort, within the power of the party to make,

it might have been prevented, when the possible consequence of the collision to life and property are considered, is bad in morals, and it ought in law to defeat all right of recovery in the party who commits it. It has often been held by this court that a party cannot recover for an injury caused by the negligence or wrong of another, if by the exercise of reasonable care on his part he might have avoided it. *Raridon v. Cent. Iowa Ry. Co.*, 65 Iowa, 640, and 69 Iowa, 527. The rule, as applicable to an injury to stock occasioned by the want of a fence, is modified to some extent, doubtless, by the statute. But there is nothing either in the language of the statute or the nature of the case requiring the courts to hold that it does not apply to the state of facts set out in the certificate. We are of the opinion, therefore, that the first question should be answered in the affirmative; and upon the facts disclosed in the certificate the second should be answered in the negative.

REVERSED.

CORMAC V. THE WESTERN WHITE BRONZE COMPANY.

1. **Evidence: BOOKS OF ACCOUNT: INTRODUCTION AGAINST OWNERS BY AGENT MAKING ENTRIES.** In an action against defendant by plaintiff, who had been its secretary and manager, defendant's books of original entry were admissible against it, even though some of the entries therein were made by plaintiff; for they were made by him as defendant's agent.
2. **Corporations: INTEREST IN STOCK: LIABILITY FOR ASSESSMENTS.** E. owned shares of stock in the defendant corporation which he contracted to sell to plaintiff, and plaintiff made his note for the purchase price, but the note was not paid, and the stock was not transferred to plaintiff on the books of the company. *Held* that plaintiff was not liable for assessments on the stock. (See cases cited in opinion.) The fact that plaintiff, by virtue of a proxy, voted at meetings of the stockholders on the stock of E., and that defendant took his note to E., but not on account of any transaction between it and plaintiff, did not make him liable for assessments. Neither did the fact that he subscribed for stock, without ever becoming in fact a stockholder, make him liable.

77	32
99	493
77	32
107	384

Cormac v. The Western White Bronze Co.

3. **Practice: REMARK OF COURT: EFFECT ON JURY.** A remark of the court made in announcing its opinion upon a point argued by counsel, which could not have been understood as addressed to the jury, or for their consideration, and which they could not have considered without disregarding the charge of the court, cannot be regarded as having affected the verdict.
4. **Instructions: SPECIAL INTERROGATORIES: WHEN PROPERLY REFUSED.** Special interrogatories to the jury are properly refused when they are not relevant to any issue in the case; and when they inquire about matters of which there is no evidence; and when they are such that no possible answer which could be given to them could control the general verdict, in the absence of other special findings. (See opinion for applications of the rule.)

Appeal from Polk District Court.—HON. JOSIAH GIVEN,
Judge.

FILED, JANUARY 25, 1889.

ACTION to recover an amount alleged to be due to plaintiff on account of salary earned as secretary and manager of defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Parsons & Perry, for appellant.

James M. & George E. McCaughan, for appellee.

ROBINSON, J.—Plaintiff was the secretary and manager of defendant during the years 1885 and 1886, and for the month of January, 1887, and claims a balance due on account of salary of \$755.62. Defendant denies the alleged indebtedness, and seeks to recover of defendant \$890.29, on counter-claims for money of defendant alleged to have been collected by plaintiff and converted to his own use, and for unpaid assessments on capital stock of defendant alleged to be owned by plaintiff. The jury found that defendant owed to plaintiff the sum of \$379.20.

I. Plaintiff introduced in evidence certain books of account, which belonged to and had been kept for

1. EVIDENCE : the defendant. Some of them were objected to on the ground that they had been kept by plaintiff while he was acting as secretary of defendant, and on the further ground that they were not shown to be books of original entries. We are of the opinion that the books were properly retained in evidence. After they were introduced it was admitted that they were defendant's books of original entries; that they were kept in the ordinary manner, and in the regular course of business; and that the entries therein were made at the time of the transactions which they represented. This made them competent evidence as against defendant. The fact that some of the entries were made by plaintiff was immaterial, under the issues of the case. He made them, not for himself, but for the defendant, and as its agent; and the books, when completed, were the books of defendant, admissible in evidence against it.

II. One Eakin procured of defendant a certificate for shares representing three thousand dollars of its capital stock. He agreed with plaintiff to sell and transfer this to him when he should pay the amount required therefor. A note for seven hundred and fifty dollars was given to Eakin by plaintiff on account of this stock, and the certificate was placed in the hands of one Fuller, to be delivered to plaintiff when he should pay the note. The note was not paid, and the stock was not transferred. On the books of the company it stood in the name of Eakin. While the plaintiff had an interest in this stock, he never owned it, and never agreed with defendant to pay for it. He was not, therefore, liable to defendant for unpaid assessments made on account of it. See Code, sec. 1078; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270; *Hale v. Walker*, 31 Iowa, 344; *Pullman v. Upton*, 96 U. S. 328, and cases therein cited; Cook, Stocks, sec. 246. Defendant's stock subscription book shows that plaintiff subscribed for fifty shares of stock, but he testifies that the number was changed from twenty to fifty without his knowledge

2. CORPORATIONS : interest in stock : liability for assessments.

or authority, and that he never became a stockholder. He voted at meetings of the stockholders on the stock of Eakin, but did so by virtue of a proxy. His vote to Eakin was taken by defendant, but not on account of any transaction between it and plaintiff. It may be that plaintiff had intended to take stock in his own name when he subscribed for it, and that he procured Eakin to take the stock in question in fulfillment of his subscription, but that would not make any privity between him and defendant on the stock which was actually taken by Eakin. The court ruled correctly in withdrawing from the jury all consideration of assessments on the Eakin stock. Complaint is made in this connection of a remark of the court made in announcing

its opinion on the question of plaintiff's liability on the Eakin stock, after argument of counsel on that question. The remark was not designed as an instruction to the jury, and could not have been so understood. It was not addressed to them, and was not of a nature to have been considered while they were deliberating upon their verdict, unless they disregarded the charge of the court, and we cannot presume that they did.

III. The court refused to submit to the jury five special interrogatories asked by defendant. The first was as follows: "(1) Did the books of account

kept by the plaintiff, while in the management of defendant's business as its agent, show that he received, on account of defendant, more money than he paid out, and, if so, what sum?" This was not relevant to any issue in the case, and was properly refused. The second interrogatory was as follows: "(2) Did he receive, during the time that he had the management of defendant's business, any sums of money which do not appear upon the books kept by him, and for which he has not accounted to the defendant, and, if so, what sum?" We are not prepared to say that this might not have been properly submitted, and yet it does not appear to us that prejudice could have resulted from the refusal to submit it. No answer

3. PRACTICE;
remark of
court : effect
on jury.

4. INSTRUCTIONS:
special inter-
rogatories:
when properly
refused.

which could have been given would have controlled the general verdict, in the absence of other special findings. *Dreher v. I. S. W. Ry. Co.*, 59 Iowa, 601. The third special interrogatory sought to have the jury state whether plaintiff was a subscriber to the capital stock of defendant, and, if he was, to state the amount of calls for payment, if any, made thereon and unpaid. This was not made material by any issue or evidence in the case. Defendant does not seek to recover on a subscription for stock, but on stock a certificate for which was issued to Eakin. No call was ever made on plaintiff's subscription. The fourth special interrogatory asked inquired in regard to a settlement of accounts between plaintiff and the board of directors of defendant, and was properly refused, for the reason that there was no evidence of such a settlement. The fifth special finding was to be answered only in the event that the jury answered the fourth, and was therefore properly refused.

IV. Counsel for appellant base some argument upon the weight and effect of the evidence. We do not deem it necessary to review this at length, nor to notice more particularly other questions raised. The abstract does not purport to set out all the evidence given on the trial, and some of the questions discussed have no foundation in the record as presented to us. It is sufficient to say that we have examined all questions presented by the record with care, but do not find any error prejudicial to defendant. The judgment of the district court is therefore

AFFIRMED.

EVERTS V. THE DISTRICT TOWNSHIP OF ROSE GROVE.

77	37
89	208
77	37
116	540
117	323

1. **Corporations: PUBLIC: PAROL TO CONTRADICT RECORDS OF: COLLATERAL ATTACK.** Parol evidence in a collateral proceeding cannot be received to contradict the records of a public corporation required by law to be kept in writing, or to show mistake therein. (See authorities cited in opinion.) Accordingly, in an action on a money obligation of a school district, which the records of the annual meeting of the electors, and of a subsequent meeting of the directors, showed to have been issued upon the authority of those bodies, *held* that the testimony of electors was inadmissible to show that no such action was taken at the annual meeting, and that parol evidence was properly excluded tending to impeach the validity of the record of the board of directors, on the ground that it was made by an interested member of the board, who was not its secretary.
2. **School Districts: RATIFICATION OF ACTION OF BY ELECTORS.** A contract made by a school district, which it might lawfully have made by authority of the electors at their annual meeting, becomes binding upon the district after ratification by the electors, though originally made without such authority.
3. ——— : **POSSESSION OF SCHOOL-HOUSE SITE: NOTICE TO SUBSEQUENT PURCHASERS.** The possession by a school district of a school-house site, under contract with the owner of the land, is notice to subsequent purchasers of its rights, and it is not divested of those rights by the transfer, without reservation, of the tract of which the site is a part.
4. ——— : **SETTLEMENT OF DISPUTED CLAIM: CONSIDERATION.** The settlement of a disputed claim between a school district and a claimant is a good consideration for an order of the district to pay a sum of money agreed in the settlement to be paid in satisfaction of the claim.

Appeal from Hamilton District Court.—HON. S. M. WEAVER, Judge.

FILED, JANUARY 29, 1889.

THIS is an action on two orders drawn by the president and secretary of the defendant on its treasurer, directing him to pay a sum of money to E. L. Norris in

Everts v. The Dist. Tp. of Rose Grove.

one year from the date thereof, with ten per cent. interest. It is alleged in the petition that the warrants were issued in pursuance of a settlement had between defendant and the payee named therein of a disputed claim, and that such settlement was authorized by the electors of the district township, which action was duly made of record. This averment is denied in the answer, and it is alleged that the orders were issued without consideration, and without authority of law. Upon the close of the testimony the district court directed the jury to find specially on a single question of fact, and upon that finding entered judgment for plaintiff for the amount of the warrants. Defendants appeal.

D. D. Chase and J. L. Kamrar, for appellant.

Martin & Wambach, for appellee.

REED, C. J.—The orders in suit were issued on the twelfth of March, 1877. It appears that in 1868 the board of directors of the district township entered into a contract with S. L. Rose, by which he agreed to furnish ground for a school house, and erect thereon a school house for the district. The board, in making the contract, acted under a resolution adopted by the electors at the annual meeting in March, 1866. In 1869, Rose did erect a school house on lands belonging to himself, which the district used for school purposes up to 1885. He did not, however, execute to the district either a lease or conveyance of the grounds, and he subsequently executed a mortgage to a third party on the farm on which the building was situated. He also subsequently conveyed the farm to Norris, the payee named in the warrants. He made no reservation of the ground upon which the school house was situated in either the mortgage or deed, and the mortgage was subsequently foreclosed, and the premises sold, and a sheriff's deed thereof was given to the purchaser. After the erection of the school house a claim was made by Rose and Norris that the district was required by the terms of the

Everts v. The Dist. Tp. of Rose Grove.

contract to erect and maintain a fence around the grounds on which it was situated, and plant shade-trees thereon, and that they had been damaged by its failure to perform that part of the agreement, and plaintiff's claim is that the warrants were issued upon a settlement of that claim, and in pursuance thereof. The warrants were issued on the day of the annual meeting of the electors in 1877, and the single question of fact submitted to the jury was whether the president of the board of directors who signed the orders was present at the meeting of the board on that day. As that question, and the finding of the jury thereon, which was in the negative, is not claimed by either of the parties to be conclusive of the rights involved, the action of the court may be regarded as in effect a direction to the jury to return a general verdict for plaintiff. The principal question in the case, then, is whether there was any evidence tending to establish the defenses pleaded. If there was, the parties had the right to have the question of its sufficiency passed upon by the jury.

In addition to the orders, which are *prima-facie* evidence of indebtedness, plaintiff introduced what purported to be the record of the annual meeting of the electors, in March, 1875, which recites the adoption of a resolution empowering and directing the board of directors to adjust and settle the claims of Rose and Norris in such manner as in the judgment of the members of the board shall be for the best interest of the district. Also what purported to be the record of a meeting of the board of directors, held on the day on which the warrants were issued, which recites an offer of compromise by Norris of his claim, and an acceptance by the board of that offer, and that the orders were issued in pursuance of that action. Defendant introduced several electors of the district, who testified that they were present at the annual meeting in March, 1875, and that no action whatever was taken by the electors with reference to said claims. It also offered evidence tending to prove that the alleged record of the meeting of the board of directors on the twelfth of March, 1877,

was in the handwriting of Rose, who, although a member of the board, was not its secretary, and that the signatures of the members of the board were appended to it by him.

If it were competent to contradict the record by parol, of course the evidence introduced would have presented a question for the jury. But "parol evidence in a collateral action cannot be received to contradict the records of a public corporation, required by law to be kept in writing, or to show a mistake in the matters as otherwise recorded." 1 Dill. Mun. Corp., sec. 299; *School Dist. v. Atherton*, 12 Metc. 105; *Morrison v. Lawrence*, 98 Mass. 219; *Mayhew v. Gay Head*, 13 Allen, 129; *Durfey v. Hoag*, 1 Aiken, 286. We think, therefore, that the district court was right in disregarding the parol evidence as to the action taken by the electors. The meeting was one required to be held by the statutes, and it was the duty of the secretary to keep a record of the action taken by the electors thereat. If an incorrect record was made, the remedy was by correcting it at that or some subsequent meeting. But its correctness cannot be questioned in a collateral action.

It was contended, however, that the electors had no power to authorize the payment of the claim. This claim is based upon the fact that the authority conferred upon the board of directors by the meeting in 1866 was to contract with Rose for the erection of the school house, and for the erection and maintenance of the fence around the grounds, so long as they should be used by the district, while the agreement actually entered into was that the district should erect and maintain the fence. But if it should be conceded that the board exceeded the powers conferred upon them in entering into the contract, their action was subject to be ratified by the district, and the action of the electors in authorizing the settlement of the controversy which grew out of it was a ratification.

It was also contended that the claim was absolutely without merit, and for that reason the warrants were

Everts v. The Dist. Tp. of Rose Grrve.

without consideration. This claim is based upon the alleged fact that the district was divested of all right in the ground by the mortgage and subsequent conveyance of the farm in which it was included, the position being, in effect, that the undertaking of Rose to furnish grounds for the school house constituted the consideration for the agreement of the district to build and maintain the fence, in so far as that agreement was beneficial to him. But it does not appear that the district was divested by the conveyance and mortgage. It was in possession when those instruments were executed, and both the mortgagee and purchaser were charged with notice of its rights. It does not appear ever to have been evicted from the premises, but continued in possession for many years after the foreclosure of the mortgage, and Norris' action in asserting the claim was in some sense a recognition of its rights. The settlement and adjustment of a disputed claim is a valid consideration for the agreement to pay the amount agreed upon by the parties in the settlement. We think that the action of the court in directing the verdict is right, and the judgment will be

AFFIRMED.

77	42
136	656

PROUTY V. BULLARD *et al.*

Tax Sale and Deed: PURCHASE BY AGENT: WHETHER GOOD AS AGAINST PRINCIPAL: BURDEN OF PROOF AS TO PRINCIPAL'S INTEREST. Plaintiff purchased the land in question at tax sale when he was the attorney and agent of the defendant B. in such a sense that, had the legal title of the land been in B. at the time of the sale, plaintiff's tax deed, subsequently taken, would have given him title only in trust for B. But the title was at the time in one V., and B.'s claim as against the tax title is based upon an alleged equity in the land, which did not exist if V. was an innocent purchaser; and it seems to be conceded that plaintiff, when he purchased at tax sale, was of the opinion that V.'s title was good, and that B.'s equity was irretrievably gone. *Held* that whether plaintiff's tax title was good as against B. depended upon the question whether B.'s equity was *in fact* gone when plaintiff purchased, and that his relation to B., as attorney and agent, placed upon him the burden to show that V.'s title was good, and that B.'s equity was in fact divested thereby; and, having failed to establish these facts by the evidence, in an action by him to quiet his tax title, a decree for defendants was properly entered.

Appeal from Humboldt District Court.—HON. LOT THOMAS, Judge.

FILED, JANUARY 29, 1889.

ACTION in equity to quiet in plaintiff the title to lots numbers 1 and 2, in section 28, in township 92, range 29, in Humboldt county, Iowa. Defendant Bullard answered, denying the equities of the plaintiff's petition, and averring an equitable interest therein in his own behalf. There was a decree for the defendants, and the plaintiff appeals.

Albert E. Clarke, for appellant.

E. F. Bullard and *E. G. Bullard*, for appellees.

GRANGER, J.—The plaintiff's title is based on a tax deed executed November 4, 1880, on a sale for taxes

Prouty v. Bullard.

made in 1877, for the taxes of 1876. For the purposes of this case it may be said that this deed evidences a good title in the plaintiff, unless at the time of making the purchase at the tax sale and obtaining his deed, such a trust relationship existed between the plaintiff and the defendant Bullard that equity would preclude him from making such a purchase. The relationship claimed by appellees is that from some time in the year 1871 to about September, 1882, the plaintiff was his attorney and agent for the transaction of his business in Humboldt county, he being a resident of the state of New York. This claim, we think, is established by the testimony, but whether to the extent and under such circumstances as would legally preclude plaintiff from making the purchase referred to is for our determination. Let us briefly refer to the facts. The premises in question are in section 28 of the township referred to. One H. G. Bicknell bought this with other lands in October, 1869, of one Nixon, and gave back a thirty-five-thousand dollar mortgage, which mortgage was afterwards assigned to J. P. Bonesteel. Bonesteel, to secure the defendant Bullard for a loan of seven thousand dollars, assigned to him a preferred interest in such mortgage to that amount. This assignment was made January 13, 1871, and it is by virtue of this assignment that Bullard claims an equitable interest in the land. In May, 1870, Bicknell, who still retained the title to the lands (and was the mortgagor), sold some of the lands covered by the mortgage, other than the lands in question (the lands sold being in section 29), to what is known in this case as the "Mill Co." The mill company gave back to Bullard (defendant) and Bonesteel, on the land in section 29, a thirteen-thousand dollar mortgage, under an agreement between Bullard and Bonesteel that Bullard should have a one-half preferred interest therein, and in consideration thereof he was to reassign his seven-thousand dollar interest in the thirty-five-thousand dollar mortgage to Bonesteel, which he did, November 22, 1871. In January, 1873, Bicknell and wife conveyed the land in question, with other

lands covered by the thirty-five-thousand dollar mortgage, to Nancy Nixon; and July 1, 1873, Nancy Nixon and her husband, Alfred Nixon, conveyed the same to George T. Van Hoesen; and on the first day of July, 1875, Bonesteel quitclaimed his interest in the lands covered by the thirty-five-thousand dollar mortgage, including the lands in question, to Van Hoesen. Thus, July 1, 1875, upon the record, the fee title of the land is in Van Hoesen, and it stands unincumbered. In 1877, while the title is in Van Hoesen, the land is sold to the plaintiff for the taxes of 1876, and November 4, 1880, he receives a deed therefor, by virtue of which he seeks to quiet his title.

We now consider further the history of Bullard's equitable claim. Omitting many of the details as not essential here, it may be said in brief that after every resort which reason could suggest, the title to the lands covered by the thirteen-thousand dollar mortgage so failed that Bullard has been unable to recover anything on his seven-thousand dollar claim, the security for which he held at first in the thirty-five-thousand dollar mortgage covering the land in question, and which he exchanged by agreement with Bonesteel for an interest in the thirteen-thousand dollar mortgage. We think it clearly appears that this failure is the result of a mutual mistake between Bullard and Bonesteel as to the title to the lands covered by the last mortgage. After a failure to realize on the thirteen-thousand dollar mortgage security, after the plaintiff had his tax deed, Bullard instituted a suit against Van Hoesen, Nancy Nixon and Bicknell (serving them by publication), to cancel the release or reassignment of his seven thousand dollar interest in the thirty-five-thousand dollar mortgage, and to reinstate and foreclose the same, and a decree was entered to that effect in his favor. Upon such decree he took execution, and, when proceeding to sell the premises in question, this action was commenced, and the defendant sheriff temporarily enjoined. To a clear understanding of appellant's position it is proper to state that, while he denies the force and legal effect of many of appellees'

Prouty v. Bullard.

equitable claims, he asserts that beyond controversy the title of the lands so vested in Van Hoesen as to divest it of all prior equities, and that as a tax-title holder he takes all the title and interest of Van Hoesen. This is urged upon the theory that Van Hoesen was an innocent purchaser. In the case of *Bullard v. Van Hoesen et al.*, wherein the reassignment was set aside, and a decree of sale ordered for Bullard, Van Hoesen was adjudged not an innocent holder; but of the effect of that decree we may speak hereafter. It should be kept in mind that the plaintiff was not a party to that proceeding, and that the suit was instituted after he obtained his deed.

If Bullard has equities which may prevail over the deed of the plaintiff, as we view the case, it is because of such a relationship between the parties during the period covered by the tax-sale proceedings that the law will, against plaintiff's objections, hold him as a trustee, and give Bullard the benefits arising from his acts. What, then, was that relationship? The record in the case is so voluminous that both parties have felt a necessity for apology or explanation. We cannot set out the testimony. That plaintiff was from 1871 to 1882 both the attorney as to legal matters, and the agent of Bullard as to his other business concerns in Humboldt county, cannot well be denied. He seems, in some sense, to deny the attorney relationship to the extent claimed, but the history of the business so connects him therewith that he must be held as occupying a trust relationship as to the business of Bullard in that county. He knew of the assignment of the seven-thousand dollars' interest in the thirty-five-thousand dollar mortgage; he knew of the change of security when the interest was taken in the thirteen-thousand dollar mortgage; he knew of the failure of title, and was attorney and close adviser in all the efforts to realize on the new security; he knew that Bullard was without security for his claim, unless equity would reinstate him to his former position as to the thirty-five-thousand dollar mortgage; he must have known that, as between Bullard and Bonesteel, Bullard should be reinstated, and that

equity would reinstate him to his former security. The tenor of the correspondence indicates that Bullard relied on the plaintiff to watch his interests, and advise him. In August, 1872, in a letter, he says: "Please keep me posted in regard to all matters affecting my interests there." Judging from the subject-matter of the many letters which followed, we must believe that the plaintiff undertook the trust. Bullard had collections of rent and otherwise to be made, and these had the care of the plaintiff. In other cases where lands had been sold for taxes Bullard was advised by plaintiff to buy in the certificates with a view of aiding his claims thereby. In 1878, after the land in dispute had been sold for taxes, and the period of redemption was running, plaintiff informed Bullard of the *status* of the lands in sections 29 and 30 as to taxes, and especially informed him that "thirty had been sold for taxes." We understand that his excuse for not mentioning the sale of the lots in section 28 for taxes is that, before the sale, the land had passed irretrievably beyond the reach of Bullard as security for his claim.

We think this depends upon whether or not Van Hoesen was a good-faith purchaser, and this brings us to consider that question, and we say upon the facts of the case, as disclosed by the record, there is considerable to impeach his innocence or good faith. The writer of this opinion has serious doubts of any binding effect of the decree in the case of *Bullard v. Van Hoesen et al.* to set aside the reassignment. But the petition in that case was sent by Bullard to the plaintiff, and he knew its contents. He knew of the proceedings against Van Hoesen, and the decree against him. We think Van Hoesen must have known of that when he gave his testimony in this case. Plaintiff certainly did. That case impeached the good faith of the transaction when the sale was made to Van Hoesen. The testimony of Van Hoesen in this case contains no denial of bad faith; no statement in reference thereto. The record discloses that Van Hoesen paid nothing for the land.

Prouty v. Bullard.

The deed shows a consideration of sixteen hundred dollars, and a mortgage was given for the same amount. While that may not of itself show bad faith, it is, in its connection in this case, of some importance. We infer appellant's position to be that the law presumes the good faith of Van Hoesen, and that the burden of showing the contrary is with the defendants. Such is the general rule; but with the relationship established as in this case, and where the trustee is claiming the title to property which, but for his claim, would be at the disposal of his *cestui que trust*, and he seeks relief from the rule which would render his possession one of trust, he assumes the burden of showing every fact essential to his claim. If the tax sale had occurred with Bicknell as the owner of the land, we do not think it would be claimed that the plaintiff could have bought and held the title against Bullard, and hence his right depends entirely on the character of Van Hoesen's holding. With the testimony in the case, that holding is, at the best, of doubtful merit; and, with the burden upon the plaintiff to show him an innocent holder, the plaintiff's title is without protection in that respect.

The law governing the conduct of attorneys and agents has not been a subject of discussion by counsel. It is well defined, and especially with regard to attorneys, and requires the utmost good faith. Appellant does not seek to escape the force of the rule, whatever it may be, and we think that with the utmost good faith he relied in making his purchase upon his understanding of the law,—that, Van Hoesen having the title, Bullard's interest was gone.

Other questions are presented in argument, but as our holding upon the questions discussed is the controlling one, we do not consider them. The judgment below is

AFFIRMED.

EYE V. TASKER *et al.*

Partnership: EVIDENCE TO PROVE. The note sued on was made by "Tasker Brothers." There were five brothers of that name engaged at the same place in a somewhat similar business, and they were all made defendants on the ground that they all belonged to the firm of "Tasker Brothers," and the jury found that that claim was true by bringing in a verdict against all of them. *Held* that the evidence, not set out in the opinion, was sufficient to support the verdict on appeal.

Appeal from Jones District Court. — HON. J. H. PRESTON, Judge.

FILED, JANUARY 29, 1889.

ACTION upon a promissory note. Trial by jury, and verdict and judgment for plaintiff. Defendants A. C. Tasker and T. G. Tasker appeal.

T. O. Ellison and M. W. Herrick, for appellants.

E. Keeler and J. W. Jamison, for appellee.

ROTHROCK, J.—The note in suit is in these words:

“MONMOUTH, IOWA, Jan. 15, 1887.

“Six months after date we promise to pay to order of W. Eye, at Monmouth, Iowa, five hundred dollars, with interest at the rate of ten per cent. per annum until paid. If interest is not paid when due, the same shall draw interest at the rate of ten per cent.; and, if expenses are incurred by the holder in consequence of the failure to pay at maturity, the undersigned agree to pay a reasonable attorney's fee, if suit is brought on this note.

“TASKER BROTHERS,
“(Onslow, Iowa.)”

Eye v. Tasker.

It is averred in the petition that Tasker Bros. was a partnership composed of T. G. Tasker, A. C. Tasker, W. S. Tasker and H. L. Tasker, and judgment is demanded against each of them for the amount of the note. A. C. Tasker and T. G. Tasker filed an answer, in which they denied that they were at any time members of the partnership firm of Tasker Bros. The sole question tried to the jury was whether they were chargeable as members of the partnership upon the promissory note upon which the suit was brought. The evidence to sustain the issue was based mainly upon the acts of the appellants in connection with the firm, tending to show that they were members thereof, or, if not in fact members, that they were liable to persons dealing with the firm as having held themselves out as actual members. It appears that there were five brothers named "Tasker," and that all of them were more or less interested together in farming, and in dealing in live-stock, grain and hay, in Jones county. There was a firm named "Tasker Bros." The defendants claim that the firm was composed of H. L. Tasker, W. S. Tasker and J. L. Tasker, and that the appellants, A. C. Tasker and T. G. Tasker, were not members thereof. The appellants claim that they were members of another partnership, under the name of "A. C. & T. G. Tasker." It will thus be seen that, owing to the fact that all of the brothers were engaged in somewhat similar business, the public would be likely to be misled as to their actual relation to each other. The main ground upon which a reversal is sought is that the evidence was not sufficient to authorize the finding that appellants were chargeable as partners. It is not our purpose to review the evidence. It is enough to say that a careful examination of the whole record has led to the conclusion that we ought not to disturb the verdict of the jury.

Complaint is made of the refusal to give two instructions to the jury at the request of the defendants,

Randolf v. The Town of Bloomfield.

and to the giving of the fourth paragraph of the charge of the court. We find no error in these rulings, and are of opinion that we need not set out nor discuss the instructions. Indeed, the issue was so plain and well defined, and the law governing the same is so well understood, that it would be a marvel if any court should fail to properly instruct the jury.

AFFIRMED.

RANDOLF V. THE TOWN OF BLOOMFIELD.

1. **Pleading: WAIVER OF ERROR BY ANSWERING.** Error, if any there was, in overruling defendant's motion to require plaintiff to make his petition more specific, was waived by answering the petition. (See cases cited in opinion.)
2. **Nuisance: TO HOMESTEAD: MEASURE OF DAMAGES.** The owner of a homestead, in an action to recover for a nuisance affecting his homestead and the health and comfort of his family, is not limited to the damages sustained, by reason of the depreciation of the rental value of the property, but is entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and family. (See cases cited in opinion.)
3. **SEWER: DAMAGES: EVIDENCE AS TO OTHER SEWERS.** In an action for damages caused by a sewer which emptied near plaintiff's premises, evidence that another sewer of similar construction and use did not, at its outlet, produce offensive smells was properly excluded.
4. **Practice: EVIDENCE OMITTED BY OVERSIGHT: PRESUMPTION IN FAVOR OF TRIAL COURT.** Where plaintiff, after resting his case, asked leave to introduce further evidence on the ground of oversight, and he was allowed to introduce it, this court will presume, in the absence of proof to the contrary, that the court found it be to a case of oversight or inadvertence, and so admitted the evidence under the statute authorizing its admission in such a case.
5. **Nuisance: DAMAGES: NUISANCE KEPT BY PLAINTIFF: CONTRIBUTORY NEGLIGENCE.** In an action to recover for damages caused by a nuisance, the fact that plaintiff himself was guilty of keeping a nuisance resulting in similar damages to himself cannot defeat his recovery. The doctrine of contributory negligence does not apply to such a case.

77	50
77	581
77	589
77	50
89	710
77	50
94	85
77	50
98	357
77	50
110	386
77	50
116	77
77	50
123	335
77	50
129	471
129	479
77	50
132	238
132	238
132	241
77	50
140	435

 Randolph v. The Town of Bloomfield.

Appeal from Davis District Court.—HON. CHAS. D. LEGGETT, Judge.

FILED, JANUARY 29, 1889.

ACTION to recover for a nuisance caused by defendant constructing and maintaining a sewer, which emptied into a street, near plaintiff's dwelling house. There was a judgment upon a verdict for plaintiff. Defendant appeals.

S. S. Carruthers and F. W. Moore, for appellant.

Payne & Eichelberger, for appellee.

BECK, J.—I. The cause will be disposed of by considering the objections made by defendants to the judgment, in the order of their discussion by counsel. The petition alleges that the nuisance rendered plaintiff's dwelling "less habitable," and the smells emanating therefrom detracted from the enjoyment thereof, and produced "intolerable physical discomforts to plaintiff and his family, causing sickness in his family," to the great damage of plaintiff, etc. The defendant moved the district court for an order requiring plaintiff to make his petition more specific, so as to show the nature of the sickness of plaintiff's family, its duration, etc., and other matters. The motion was overruled. The defendant answered the petition, and thereby waived the error, if any there was, in overruling the motion. *Kline v. K. C., St. J. & C. B. Ry. Co.*, 50 Iowa, 656; *Coakley v. McCarty*, 34 Iowa, 105.

II. The district court held in the instructions that plaintiff was not limited in his recovery to the damages sustained by reason of the depreciation of the rental value of the property, but was entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and his family. We think the instructions are correct. The

1. PLEADING:
waiver of
error by
answering.

2. NUISANCE:
to homestead:
measure of
damages.

Randolf v. The Town of Bloomfield.

premises which the nuisance affects were occupied by plaintiff and his family as his homestead. Surely it would be vain to endeavor to determine plaintiff's damages by inquiring as to the rental value of his homestead. It was not for rent, and may not have been so constructed or so located as to be sought for by tenants. Yet it may have been well adapted to the wants, convenience and tastes of plaintiff and his family. To them it was a home, and the deprivation of the comforts enjoyed by plaintiff and his family could not be compensated by estimating its rental value alone. Wood, Nuis., sec. 866; 3 Suth. Dam. 416; 5 Amer. & Eng. Cyclop. Law, p. 38, sec. 9, 2b; *Brown v. Railway Co.*, 80 Mo. 457; *Pierce v. Wagner*, 29 Minn. 355; 13 N. W. Rep. 170; *Emery v. Lowell*, 109 Mass. 210. The law requires that plaintiff be compensated for the injury he has sustained by the nuisance. This court has held that the measure of damages for trespass to real property is not complete unless the owner be compensated for the use and enjoyment, if he be deprived thereof. *Graessle v. Carpenter*, 70 Iowa, 166. While rental value may be the subject of inquiry in some cases in order to determine the damages, it is plain that when the enjoyment of a homestead, as in this case, was destroyed or diminished, the true rule for the measure of damages requires the owner to be compensated therefor. In *Shively v. C. R., I. F. & N. W. Ry. Co.*, 74 Iowa, 169, and in *Loughran v. City of Des Moines*, 72 Iowa, 382, instructions were approved which hold that recovery for the depreciation of the rental value of property occupied by the plaintiffs as a homestead, caused by a nuisance, may be recovered; but it is not held that no other element, as the deprivation of the comfortable enjoyment of the property, cannot be considered in determining the damages. No such question was made in either case. In the last-named case it was held that damages resulting from loss of time, and expenses incurred by sickness caused by the nuisance, should be allowed.

Randolf v. The Town of Bloomfield.

III. The defendant proposed to prove that another sewer of similar construction and use did not, at its outlet, produce offensive smells. The evidence was rightly excluded, for the reason, if no other, that the evidence did not propose to show that the two sewers were alike in the construction, and in their use were not subject to different conditions. The sewers may have been similar in their use and construction, and yet differ as to consequence of their use. It may be that if they were alike, or the same, in their construction and use, the effects of the use of each would have been alike.

3. —: sewer:
damages: evi-
dence as to
other sewers.

IV. After plaintiff had rested his case, and before the argument to the jury had been commenced, the court permitted plaintiff, against defendant's objection, to introduce evidence to show the depreciation in the rental value of the property, caused by the nuisance. Counsel for defendant admit that if there had been any oversight in the introduction of the evidence it would have been rightly admitted under the statute. We will presume that the district court found it to be a case of oversight or inadvertence. The motion was based upon that ground, and, in the absence of proof to the contrary, we will hold that the court ruled rightly, and in so ruling found the existence of such oversight or inadvertence.

4. PRACTICE: evi-
dence omitted
by oversight:
presumption
in favor of
trial court.

V. The defendant asked certain instructions intended to apply the doctrine of contributory negligence to the case, on the ground that plaintiff had maintained nuisances himself, which caused offensive smells upon his premises. The injury complained of by plaintiff is a nuisance maintained by defendant. Now, it is very plain that plaintiff, by maintaining another nuisance, would not contribute to the injury caused by defendant's nuisance. He would cause a separate and additional injury, resulting from wholly different acts from those done by defendant. He would not contribute to the injury done by defendant, but would

5. NUISANCE:
damages: nu-
isance kept by
plaintiff: con-
tributory neg-
ligence.

Shepard v. The Chicago, R. I. & P. Ry. Co.

commit another injury. It is very plain that the doctrine of contributory negligence does not apply to the case. But if plaintiff did maintain another nuisance, this should be considered in determining the extent of defendant's liability. Upon this point the district court gave the jury correct instructions.

VI. The verdict is sufficiently supported by the evidence. While there is the usual conflict, it cannot be said that on any point there is an absence of all evidence to support the findings of the jury.

AFFIRMED.

SHEPARD V. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

1. **Evidence: ERROR IN ADMITTING: CURED BY CHARGE OF COURT.** Error in admitting improper evidence is cured by an instruction which withdraws it from the consideration of the jury.
2. **Railroads: EJECTION OF PASSENGER: MEASURE OF DAMAGES: INSTRUCTION.** In this action for damages for being wrongfully ejected from the defendant's train, the court instructed: "When a passenger is wrongfully compelled to leave a train, and suffer insult and abuse, the law does not exactly measure his damage, but it authorizes the jury to consider the injured feelings of the party, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such sum as the jury may say is right." *Held*, especially in view of the whole charge, that this instruction was not subject to the objection that it authorized an allowance of exemplary damages; because damages may properly be allowed for mental suffering caused by indignity and outrage, whether connected with physical suffering or not, and such damages are compensatory, and not exemplary.
3. **New Trial: MISCONDUCT OF COUNSEL: DISCRETION OF COURT.** If it was misconduct on the part of the plaintiff's attorney, in his closing remarks to the jury, and in the absence of the judge, to comment upon a case which had been read to the court in the hearing of the jury, the granting of a new trial on that ground was a matter for the sound discretion of the trial court, whose action cannot be set aside without a showing of the abuse of that discretion. (See *George v. Swafford*, 75 Iowa, 491.)

77	54
93	764

77	54
95	571

77	54
104	450

77	54
106	5

77	54
107	520

77	54
120	385
123	463

Shepard v. The Chicago, R. I. & P. Ry. Co.

Appeal from Wapello District Court.—HON. DELL STUART, Judge.

FILED, JANUARY 29, 1889.

ACTION to recover damages alleged to have been caused by wrongful acts on the part of defendant. The cause was tried to a jury, and a verdict and judgment rendered for plaintiff. The defendant appeals.

Thos. S. Wright and *McNett & Tisdale*, for appellant.

Roberts & Epps and *E. L. Burton*, for appellee.

ROBINSON, J.—The petition alleges that plaintiff, on the twenty-third day of August, 1886, procured of defendant a railway ticket from Ottumwa to Knoxville, Iowa, and return by way of Knoxville Junction; that on said day she took passage on a freight train of defendant, at Ottumwa, for the purpose of going to Knoxville; that when the conductor examined her ticket he agreed to notify her when to change cars, and to give her an opportunity to change cars at Knoxville Junction; that she at that time told the conductor that she was a stranger on the road; that she relied on said promise of the conductor, and remained on the train until it had gone two or three miles beyond Knoxville Junction, at which place the conductor stopped his train, and in a very rude and insolent manner, and by the use of rough and abusive language, compelled and forced plaintiff to leave the train, against her protest, in a steep and dangerous place in the road, with a heavy basket of baggage and her infant child; that the weather was intensely warm, and plaintiff was compelled to walk the distance back to Knoxville Junction, and carry her child in her arms, and leave the baggage by the roadside; that in consequence of what they were compelled to endure she and her child became sick, and she was compelled to give the child additional care,

Shepard v. The Chicago, R. I. & P. Ry. Co.

watching and medicine; that by reason of said wrongful acts of the conductor plaintiff suffered great bodily pain and mental anguish; that she was thereby humiliated, insulted, and greatly wronged, and suffered damages in consequence in the sum of four hundred and ninety-five dollars. The answer contains a general denial, and alleges that if plaintiff received any injury, or suffered any damages, they were the result of her own negligence and wrongful acts, and that defendant is in no manner responsible therefor. The verdict and judgment were for the sum of three hundred dollars damages.

I. The evidence submitted on the part of plaintiff tended to sustain the allegations of her petition. Much of it was objected to by defendant. Some of the evidence offered by defendant to prove its rules and customs in regard to carrying passengers on freight trains, and the stopping of such trains at depots, was rejected. Counsel for appellant discuss various questions based on the rulings of the court in admitting and rejecting evidence, which we do not find it necessary to consider in detail, for the reason that the evidence as to which the rulings were made was necessarily withdrawn from the consideration of the jury by the charge of the court. The charge specified the obligations and duties of defendant and its employes in regard to stopping at stations, notifying passengers when to change cars, and carrying them to their destination. That was followed by this paragraph: "These general duties of the railway company are defined that you may have them out of the way. They are not really involved in this case, and should not have your attention further than you should not be influenced by the arguments made in your presence concerning them. The material question for you to determine is this: Did the conductor, in a rough and rude manner, compel the plaintiff to leave the train, as claimed by her?" The jury were also told that they need not consider how plaintiff came to be carried past

1. EVIDENCE:
error in ad-
mitting: cured
by charge of
court.

Shepard v. The Chicago, R. I. & P. Ry. Co.

Knoxville Junction ; that they were to “consider all the evidence bearing on the question, and determine where and how plaintiff left defendant’s train, and what the conduct of the conductor was towards her,” that if they found that “plaintiff left the train at her own request, as claimed by the defendant, your verdict should be for the defendant;” and that, if they found for the plaintiff, they should not compensate her for injury to her health or the health of her child, nor for loss of time ; that her damage must be nominal, or based on the wrongful conduct of the conductor. Under these instructions, all evidence in regard to the management of the train, the neglect of duty by employes, and the obligation of passengers prior to the time the train left Knoxville Junction, was immaterial ; and if the instruction were followed, evidence of that character which was admitted could not have been considered by the jury. It would undoubtedly have been the better practice to exclude all improper evidence when offered, but it seems to have been admitted on the theory as to plaintiff’s right of recovery, according to which the petition was drawn. Unless we adopt the rule that error in the admission of evidence cannot be cured during the trial, we are of the opinion that the judgment of the district court should not be disturbed on the grounds under consideration. It has been frequently, and we think properly, held that an error of that kind can be so cured. *Sullens v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa, 659, and cases therein cited ; *State v. Schaffer*, 74 Iowa, 707 ; *State v. Postlewait*, 14 Iowa, 449. We discover no ground for believing that in this case the charge of the court was disregarded.

II. The plaintiff testified that after the train left Knoxville Junction the conductor asked her where she was going, to which she answered, “to Knoxville city;” that he then said, “you ought to have changed cars at Knoxville Junction,” to which she replied, “Why didn’t you tell me when we were there?” that he then told her she must get off; that she refused to get off, and

 Shepard v. The Chicago, R. I. & P. Ry. Co.

expressed a desire to remain in the train until the next station was reached ; that the train was stopped, and the conductor asked plaintiff if she was going to get off, to which she answered that she was not, and that he would have to take her back to Knoxville Junction ; that the conductor thereupon told her with much profanity to get off, that if she didn't get off he would kick her off, that he was tired of "damn niggers," and that she must get off there ; that he threw her bundle off, and took her baby onto the ground, and that she finally followed ; that he left her standing on the track, and, as the train started, said, "I don't care a damn, what you do." We have not given all nor the worst of the language alleged to have been used by the conductor. The testimony of plaintiff was corroborated by another witness. It is proper to say that all testimony of that character was denied by the conductor and by one other person, and that the evidence on the part of plaintiff was not in all respects consistent and satisfactory; but the witnesses testified in the presence of the jury, who were able to note the appearance of the witnesses, and their manner of testifying, and were therefore better able than we can be to judge of the weight to which the testimony of each witness was entitled. Under the well-known rules of practice, the verdict cannot be disturbed by us because of a doubt in our minds as to the preponderance of the evidence being with plaintiff.

The court gave to the jury the following as a part of its charge : "Where a passenger is wrongfully compelled to leave a train, and suffer insult and abuse, the law does not exactly measure his damage, but it authorizes the jury to consider the injured feelings of the party, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such a sum as the jury may say is right." That paragraph of the charge is criticised by counsel for appellant as authorizing an allowance by the jury of exemplary damages. It was held in *McKinley v. Chicago & N. W. Ry. Co.*,

2. RAILROADS:
ejection of
passenger:
measure of
damages: in-
struction.

Shepard v. The Chicago, R. I. & P. Ry. Co.

44 Iowa, 315, that compensatory damages might be allowed for mental suffering, caused by outrage and indignity, and that it was proper to take into consideration the wounded feelings of the person who suffered the wrong. If these things may be considered in connection with physical suffering in estimating actual damages, we know of no reason which forbids their being considered in the absence of physical suffering. It is said that the "mental pain," contemplated by the court in the case last cited, includes something more than mere injured feelings or wounded pride, and that the latter can be considered only where malice is alleged and proven, and where there has been proof of actual bodily injury. We do not think the claim is well founded. Humiliation, wounded pride, and the like, may cause very acute mental anguish. The suffering caused would undoubtedly be different in different persons, and no exact rule for measuring it can be given. In ascertaining it much must necessarily be left to the discretion of the jury as enlightened by the charge of the court. The charge given in this case, as a whole, confined the jury to an allowance for compensatory damages.

III. Objections are made to some portions of the charge on the ground that, although they were correct as abstract statements of law, they were not applicable to the facts of this case. We do not think the objections are well founded. Some portions of the charge were more elaborate, perhaps, than the case required, but the portions, to which the objections we are considering were made, were designed to make clear to the jury the law which should govern their deliberations.

IV. An attorney for the appellee, during his closing remarks to the jury, commented upon a case which had been read to the court in the hearing of the jury. Appellant alleges that in this there was misconduct, and made it a ground of its motion for a new trial. The comments were made during the absence of the judge, and do not seem to have been called to his attention until after the cause had

3. New trial:
misconduct of
counsel: dis-
cretion of
court.

Probert & Armbruster v. Anderson.

been submitted to the jury, a verdict returned, and a motion for a new trial filed. The matter of which complaint is made was argumentative in its character, and was not an attempt to strengthen the case of plaintiff by stating alleged facts pertinent to the issues, but not sustained by the record. Under these circumstances, if there was in fact misconduct as charged, no abuse of the discretion of the court in refusing to set aside the verdict on that ground is shown. *George v. Swafford*, 75 Iowa, 491. We discover no sufficient reason for reversing the judgment of the court below. It is therefore
AFFIRMED.

PROBERT & ARMBRUSTER · V. ANDERSON.

1. **Pleading: DENYING SIGNATURE TO PAPER SUED ON : BURDEN OF PROOF.** In an action upon a contract which plaintiffs claimed to own by virtue of a written but lost assignment from the original owner, defendant denied generally the allegations of the petition. *Held* that this, without a special denial of the signature to the alleged assignment, put in issue the execution of the assignment and plaintiffs' ownership of the claim, and cast upon plaintiffs the burden to establish the existence of the assignment, and to show, at least, its substance, and that it was of force when the action was commenced, and when a judgment was demanded thereon. (See Code, sec. 2780.)
2. **Instructions : REFERRING TO PLEADINGS.** The court directed the jury to find for plaintiffs unless they found that the signature of the defendant was obtained by fraud "as alleged in the answer." *Held* that this reference to the answer was not error, because the substance of the answer had been stated in a previous instruction, to which the jury was referred by the language used.

Appeal from Wright District Court.—HON. JOHN L. STEVENS, Judge.

FILED. JANUARY 29, 1889.

 Probert & Armbruster v. Anderson.

ACTION upon a contract for the purchase of a twine-binder harvester. There was a judgment upon a verdict for defendant. Plaintiffs appeal.

Martin & Wambach and Pillsbury, Moats & Moats,
for appellants.

Chase & Chase, for appellee.

BECK, J.—I. The petition declares upon a contract in the form of an order executed by the parties for the purchase of a twine binder. The order expresses the terms and conditions of the purchase, which need not be here stated. It is alleged that plaintiffs are the assignees of the claim upon the contract, under a written assignment, which has been lost. The substance of the assignment is set out in an amended petition. The defendant denies generally the allegations of the petitions, and alleges that he took the binder upon an oral agreement providing, substantially, that he should try it, and, if not satisfied with it, he should have the right to return it without any liability; that at the solicitation of the sellers of the machine he signed what was represented to him as an order for the machine, but that it was represented by the seller that defendant would in no manner be liable thereon, unless he should elect to purchase the machine; and that upon trial the machine proved unsatisfactory and defective, and defendant elected not to purchase it. In an amended answer defendant admits the signature to the contract, but says it was procured by fraud and misrepresentation of the other party, whereby defendant was induced to believe that it was nothing more than an order for the machine, and would not change or modify the oral agreement for its purchase, and therefore he did not have the paper examined, as he did not read or understand the English language.

II. By instructions given to the jury they were required to find that the contract was owned by plaintiffs before rendering a verdict for them. It is insisted

1. PLEADING:
denying signature to
paper sued on:
burden of
proof.

that, as there is no denial of the signature of the assignment, it is to be regarded as admitted, under Code, section 2730. But the defendant's answer put in issue the execution of the assignment, and plaintiffs' ownership of the claim. He denies that the claim was transferred by the assignment. Certainly the existence and effect of the assignment was put in issue. The burden rested on plaintiffs to establish the existence of the assignment; to show the substance, at least, of this instrument, and that it was of force, or, rather, that the contract it expressed was in force, when the action was commenced, and when a verdict and judgment were demanded thereon. The instructions given to the jury are in accord with this view. But counsel insist that there was no evidence authorizing the giving of these instructions. We think otherwise, and that it was an issue to be determined by the jury, upon which there was evidence, whether there was in fact an assignment, and whether it was executed before the suit was commenced.

III. An instruction directs the jury to return a verdict for plaintiffs, if they find certain facts, unless the signature of defendant was obtained by fraud, "as alleged in the defendant's answer." It is insisted that this is a reference to the answer to determine the contents thereof, and is therefore erroneous. But a preceding instruction states the substance of the answer, and the language objected to is to be understood as a reference thereto.

IV. The fourth instruction given to the jury states rules as to fraud by false representations. Counsel insist that there is no evidence to which the instruction is applicable, and it is therefore erroneous. But this position is not supported by the record, which presents evidence tending to prove that plaintiffs' assignors falsely represented the substance and effect of the instrument signed by defendant, and that these representations were believed by him, and he was thereby induced to sign the paper.

Gray v. Nelson.

V. It cannot be said that the verdict is so wholly without the support of the evidence as to require it to be set aside. Upon some points of the case the evidence is weak, but upon none is there such an absence of proof as to authorize the conclusion that the verdict is the result of passion or prejudice. The judgment of the district court is

AFFIRMED.

GRAY V. NELSON *et al.*

77	63
113	282

1. **Mortgage: PURCHASE OF LEGAL TITLE BY MORTGAGEE: MERGER.** A father held a first mortgage on his son's land. Afterwards he purchased the land for a given sum, paying in cash the difference between that sum and the amount of the mortgage. The father did not at this time know of any junior liens on the land, but he did not give up the note and mortgage, and the latter was not cancelled of record. *Held* that there was no merger of the mortgage in the legal title, but that it remained the first lien in his hands and those of his assignee. (See cases cited in opinion.)
2. ——— : ——— : **ACCOUNTING TO JUNIOR LIEN-HOLDERS FOR RENTS AND PROFITS.** Where a mortgagee buys the legal title to the mortgaged land, although his mortgage is not merged therein in favor of junior lien-holders, he is not required, in the adjustment of liens, to account to them for the rents and profits of the land for the time he has enjoyed it under his deed.
3. **Gift: EXECUTED: WHAT IS NOT: INDORSEMENT ON NOTE.** A father held his son's note and a mortgage on his land as security. At one time he made an indorsement on the note as of a sum paid thereon, but there was no payment, and the intention of the father was to make him a gift of the amount. The indorsement and the father's intention were not made known to the son, but afterwards the father bought the mortgaged land of the son, applying the full amount of the note in part payment. He still retained the note and mortgage as a lien against the land, and afterwards assigned them to plaintiff, having first erased the indorsement. *Held*, as against junior lien-holders, in an action to foreclose the mortgage, that there was no executed gift to the son, and that plaintiff was entitled to judgment for the full amount of the note.

Appeal from Audubon District Court.—HON. H. E. DEEMER, Judge.

FILED, JANUARY 30, 1889.

ACTION in equity to foreclose a mortgage upon certain real estate. The defendants Deere, Wells & Co. are creditors of the defendant L. H. Nelson, the mortgagor, and the cause involves the rights of the plaintiff and Deere, Wells & Co. to subject the land to the payment of their claims against the mortgagor. There was a full trial upon the merits, and a decree was entered which was not satisfactory to either party, and both appeal.

H. W. Hanna, John M. Griggs, and Chas. S. Fogg,
for plaintiff.

Smith & Hare, for defendants.

ROTHROCK, J.—I. The defendant L. H. Nelson was the owner of the premises in controversy, and in January, 1880, he executed the mortgage in suit to his father, James Nelson, and on the nineteenth day of October, 1883, he executed a warranty deed to his father for the land. This deed was not delivered to James Nelson until the twenty-fourth day of November, 1883. On the nineteenth day of the same month Deere, Wells & Co., who were creditors of L. H. Nelson, commenced an action against him upon their claim, and levied an attachment upon the land. Judgment was subsequently rendered upon the claim, and Deere, Wells & Co. afterwards commenced an action to set aside the deed from L. H. Nelson to James Nelson as fraudulent and void, and also claiming that in any event their attachment was paramount to the deed. It was determined in that action that the attachment was good as against the deed, but the question as to the right of James Nelson to interpose his mortgage as a paramount lien was left undetermined. That case is reported in 73 Iowa, 186

1. MORTGAGE:
purchase of
legal title by
mortgagee:
merger.

Gray v. Nelson.

After the decree was entered in the district court in that case, James Nelson assigned his mortgage, and note given in connection therewith, to George Gray, the plaintiff herein.

The above are the facts in the case as they appear on the face of the record. There are some minor questions presented in the pleadings, and argued by counsel, which we will first determine without much elaboration. It is claimed by defendants that the assignment of the note and mortgage from Nelson to Gray was fraudulent and without consideration, and that the plaintiff is not the real party in interest. This claim has no foundation in the evidence. The assignment was valid, and it transferred to the plaintiff all the rights which Nelson had under the note and mortgage. It was alleged by Deere, Wells & Co. that there had been divers payments made and credits given to L. H. Nelson on the indebtedness, which were not shown in the plaintiff's petition. This claim is also without foundation. It affirmatively appears that L. H. Nelson never made any payment upon the debt. It appears that one Stewart commenced an action against L. H. Nelson, and attached the land before the deed was delivered, and obtained judgment, and bought the land at sheriff's sale on special execution, and assigned the sheriff's certificate of sale to Deere, Wells & Co. It is claimed by Deere, Wells & Co. that this is a valid lien upon the premises. But it appears by competent evidence that a redemption was had upon the sale. The cause was presented to the court below in a very elaborate manner. There is much more in the record than was necessary to determine the equities of the contending parties. There are other minor questions presented which we do not think proper to mention. The real questions in the case are but few, and we will now proceed to consider them.

The district court held that the mortgage in suit was not merged in the deed made by L. H. Nelson to James Nelson. This is the main question in the case, and the defendants contend that the decree in this respect is a

grievous error. It has long been settled in this state that, where a mortgagee takes a conveyance of the mortgaged property from the mortgagor, the mortgage is not merged in the deed, where it is the intention of the mortgagee and to his interest to still hold the mortgage as a lien. *Wickersham v. Reeves*, 1 Iowa, 413; *Vannice v. Bergin*, 16 Iowa, 555; *Linscott v. Lamart*, 46 Iowa, 315; *Woodward v. Davis*, 53 Iowa, 697, and other cases. In some of the cases it was held that there was no merger, even where the mortgage was satisfied of record. The same rule as to merger has been adopted by all courts in all civilized countries. The counsel in this case have made this plain by citing a very large number of authorities. We may say that when a principle is so well settled that it is "laid up among the fundamentals," a mere reference to the principle is sufficient. But counsel for the defendants contend that while it is to be presumed that James Nelson intended, when he took the conveyance of the land, to hold the mortgage lien, if it should be to his interest to do so to protect himself against conflicting liens, yet that presumption is overcome by the testimony of James Nelson in the case between the parties above cited. It is true that in that case he claimed that he intended to take the whole title to the land, and he claimed it under the deed. This is the intention of every mortgagee who takes title in satisfaction of the mortgage. He intends, as between himself and the mortgagor, to hold the land under the conveyance. The rule as to non-merger has no application, except as to conflicting liens.

It is necessary to state some of the circumstances surrounding the parties, as bearing upon the equities arising in the case. James Nelson was all his life a resident of Vermont. He died some time after he assigned the note and mortgage in suit to the plaintiff. His son, L. H. Nelson, came from Vermont to this state some years before the events occurred which gave rise to this litigation. The land in controversy was bought of one Stewart. James Nelson paid for the land, and had it

Gray v. Nelson.

conveyed to his son, who executed the mortgage to secure part or all of the purchase money. Some time before the deed was made the son was in Vermont on a visit, and some preliminary negotiations were had, which may be said to have resulted in an offer by James Nelson to give eighty-five hundred dollars for the land. The deed was sent by the son to his father in pursuance of this offer. Immediately upon receiving the deed James Nelson sent to L. H. Nelson about thirty-two hundred dollars in cash. This payment, added to the amount of the mortgage, made up the eighty-five hundred dollars purchase money. It is not claimed that this was not the full value of the land. At the time the payment was made James Nelson had no knowledge that any one claimed to have a lien on the land by attachment or otherwise. The note and mortgage were not surrendered to the mortgagor, and the mortgage yet remains uncanceled of record. The evidence shows beyond question that James Nelson acted in the utmost good faith. He had no intention to surrender his mortgage for the benefit of other creditors of L. H. Nelson. The doctrine of non-merger has grown up in equity to protect just such claims as that of James Nelson under this mortgage. It surely would be most inequitable to hold that because of the deed James Nelson extinguished his lien of more than four thousand dollars in favor of the creditors of his son.

II. After the deed was made, L. H. Nelson surrendered the possession of the land to James Nelson, and it was occupied and cultivated by his tenants and agents. In fixing the amount of the plaintiff's lien the court deducted from the amount of the mortgage the rental value of the land. The ground of this ruling was that a mortgagee in possession should, as between him and a junior lien-holder, account for the rents and profits of the mortgaged property. It is true that a senior mortgagee, who takes possession of the mortgaged premises under a sale in foreclosure, will, on redemption by a junior

2. —: —:
accounting to
junior lien-
holders for
rents and
profits.

Gray v. Nelson.

lien-holder who was not a party to the foreclosure proceedings, be required to account for the rents and profits during the time the possession was thus held. *Ten Eyck v. Casad*, 15 Iowa, 524; *Bunce v. West*, '62 Iowa, 80, and cases there cited. But that rule has no application in this case. If James Nelson had foreclosed his mortgage, or if he had taken possession under his mortgage without more, the claim of defendants that rents should be deducted from the mortgage would be within the rule of the cited cases. But he held the possession of the land as a purchaser. He actually paid to the mortgagor the sum of thirty-two hundred dollars for his equity of redemption, — an amount largely in excess of the rents and profits. If the mortgagor had held the possession, he would not have become liable for rents and profits, and whatever effect the deed had as a conveyance of title, as against a junior lien-holder, it had the effect to operate as an assignment of the equity of redemption. Before a mortgagee in possession can be required to account for rents and profits, he must be reimbursed for all costs and expenses and money fairly and in good faith paid to obtain possession of the subject of the mortgage. We think the court erred in holding that the mortgagee, or the plaintiff who is his assignee, should account for rents and profits.

III. It appears in evidence that at one time James Nelson made an indorsement on the note secured by the mortgage, which indorsement was in these words: "Received, April 1, 1882, six hundred and ninety four dollars, on the within note." No such payment was made. At

2. Gift: executed: what is not: indorsement on note.

the time of the endorsement James Nelson intended to make a gift of the amount indorsed to his son. He afterwards changed his mind, and, when the deed was delivered and the amount of the mortgage taken into account as purchase money, the sum indorsed on the note was not deducted therefrom. When the note was assigned to plaintiff the indorsement was erased. L. H. Nelson did not at any time know that the indorsement

The Town of Edenville v. The Chicago, M. & St. P. Ry. Co.

had been made. The court deducted the amount named in the indorsement from the mortgage, upon the ground that it was an executed gift. We think this part of the decree was erroneous. The evidence conclusively shows that there was no acceptance of the gift. Besides, if it ever had any validity as a gift, it was recalled and cancelled by the parties thereto when James Nelson bought the land without any knowledge of any lien thereon other than his own, and in effect collected the full amount of the mortgage from his son.

The cause will be remanded to the court below, with direction to enter a decree of foreclosure for the full amount of the note and mortgage, without any deductions. The result here is that the decree is affirmed on defendant's appeal, and upon plaintiff's appeal it is

REVERSED.

THE TOWN OF EDENVILLE V. THE CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY COMPANY.

77	69
143	239

Cities and Towns: STREETS: EVIDENCE OF TITLE IN PUBLIC. In this action to compel the defendant to construct a crossing at the intersection of its railway with an alleged street of plaintiff, plaintiff had the burden to establish that the alleged street was a public highway. *Held* that that fact was not established by the introduction of a duly acknowledged and recorded plat of the town, made in 1856, without showing further that the person laying out the town had title to the land. (Compare *Porter v. Stone*, 51 Iowa, 873.)

Appeal from Marshall District Court.—HON. JOHN L. STEVENS, Judge.

FILED, JANUARY 30, 1889.

THIS is an action of *mandamus* to compel defendant to construct a crossing at the point of intersection of its railway with an alleged street of the plaintiff town. The district court denied relief, and plaintiff appeals.

The Town of Edenville v. The Chicago, M. & St. P. Ry. Co.

J. M. Parker, for appellant.

Shortley & Cardell, for appellee.

REED, C. J.—Under the issue, the burden was on plaintiff to establish that the alleged street is a public highway. To establish that fact it was necessary to prove title in the public. It introduced a plat duly acknowledged and recorded by one Rhodes in 1856, by which the strip of ground was dedicated to public use as a street, but introduced no other evidence of title. That the acknowledging and recording of the plat was sufficient to vest the public with whatever interest Rhodes possessed is certainly true. Code 1851, sec. 637. It does not, however, show that he had any title or interest. “A grant to the public is not established by simply showing that a town site has been laid out. The party claiming benefits from the grant must go further, and show the title of the party laying out the town, and thus undertaking to make the grant.” *Porter v. Stone*, 51 Iowa, 373. The present case is governed by the principle applied in that. There was no evidence of such user by the public of the portion of the street in question as to establish the highway by prescription. The judgment must be affirmed on this ground, and it is unnecessary to go into other questions argued by counsel.

AFFIRMED.

77	71
102	159
77	71
114	285

BELKNAP V. BELKNAP *et al.*

Real Estate: TENANTS IN COMMON: RECOVERY OF RENT BY ONE AGAINST THE OTHER. Where land is owned by tenants in common, and is occupied exclusively for a number of years by a part of them only, and there is no agreement to pay rent, and no demand for possession is made of the occupying tenants and refused, and they have received no rent from third persons, they are not liable to pay rent to their co-tenants who have not been in possession. (See opinion for cases followed.)

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

FILED, JANUARY 30, 1889.

THE defendants are six in number, and are the wife and children of a brother of the plaintiff. The plaintiff and defendants took by inheritance from a common ancestor a quantity of land in Des Moines county. In 1884 a suit was instituted in the circuit court of said county by the plaintiff herein against the defendants for the partition of said land. The decree in said suit awarded to the plaintiff, as heir, six-fortieths of the land, and he became by purchase the owner of three-fortieths more, purchased from other heirs not parties to this suit. The defendants in this suit were awarded the other thirty-one-fortieths of the land. The decree of partition was entered in the district court, May 11, 1886, in a cause known by number as "3,466." This suit is brought to recover of the defendants for the use of plaintiff's nine-fortieths of said land prior to the partition. The defendants aver that they and the plaintiff, prior to May 11, 1886, owned and occupied the land as tenants in common, and that all matters and things set forth in plaintiff's petition in this suit could and should have been adjudicated in said suit 3,466, and that the plaintiff is therefore estopped from recovery in this action. After the close of the testimony the jury

Belknap v. Belknap.

was, on motion of the defendants, instructed to return a verdict for them on the testimony introduced, and this action of the court is assigned as error.

Newman & Blake, for appellant.

S. L. Glasgow, for appellees.

GRANGER, J.—The testimony in the case, other than some documentary proofs as to the partition suit, and some oral testimony as to the rental value of the premises, is as follows: “*F. G. Belknap*. I am plaintiff. Six-fortieths of the land in controversy was decreed to me, and I purchased three-fortieths after decree. I brought suit in 1880 (2,774) and tried to get my share of that real estate. Brought second suit (3,466) in 1884. The rental value of land from 1880 to 1887, inclusive, per year, is three (\$3) dollars per acre for cultivated land, and one (\$1.50) dollar and fifty cents for wood and pasture land.” “*F. G. Belknap, recalled*. For six years prior to September 1, 1887, I did not occupy this land, nor did any person for me. Defendant occupied it. I never got any rent whatever.” Defendants’ motion asked the court to direct a verdict for them “on the recorded testimony introduced,” and the record does not disclose the particular reason or view of the court in so doing. The facts are undisputed, so far as the plaintiff’s right to recover is concerned, and to that extent the case only involves a question or questions of law. If the plaintiff may recover, a jury should assess the damage; for the testimony is not entirely harmonious on that question. Several errors are assigned, but they are all embraced in the one “that the court erred in its instruction for the jury to return a verdict for defendants.”

Prior to the partition the plaintiff and defendants in this suit were tenants in common of the premises partitioned, and it is urged by appellees that under the facts of this case the appellant cannot recover for rents during such tenancy. There is no pretense in this case of any agreement to pay rent; that a demand for possession was made and refused; or of defendants having

Joy v. Bitzer.

received rent from third persons. With these undisputed facts, can plaintiff, as a matter of law, recover rent from the defendants? This question has received a careful consideration at the hands of this court, and their answer to such a question is in the negative. The case of *Reynolds v. Wilmeth*, 45 Iowa, 693, deals with this precise question, and settles it favorably to the action of the court below. The rule has since been followed in *James v. Brown*, 48 Iowa, 568, and in *Varnum v. Leek*, 65 Iowa, 751. This point was first presented in appellees' brief, and we have not been favored with a reply, and incline to the belief that the point is conceded. With this view we need not consider other questions presented.

AFFIRMED.

JOY V. BITZER.

1. **Appeal: DENIAL OF APPELLEE'S ADDITIONAL ABSTRACT: WHAT AMOUNTS TO.** Appellee filed an additional abstract denying many statements in appellant's abstract, and then claimed that his additional abstract must be taken as true, because not denied by appellant. But appellant filed a separate paper called a "statement," in which he stated that, because his abstract was denied so persistently and repeatedly by appellee, he had caused a transcript to be filed, and demanded that the costs of the transcript be taxed to appellee, and attached an index to the transcript, "by the aid of which," he stated, "all the material facts and points for the verification of the abstract can be readily found in the transcript." *Held* that this was by implication a re-affirmance of the correctness of his abstract, and required the court to resort to the transcript to determine the questions raised as to the contents of the record.
2. **Bill of Exceptions: SKELETON: EVIDENCE TO BE INSERTED MUST BE CLEARLY IDENTIFIED.** A skeleton bill of exceptions in this case directed the clerk to insert the evidence as shown by the translation of the short-hand reporter's notes on file in the case. The translation which the clerk inserted in no way showed, by caption or certificate, to what cause it belonged, but, after the paper had been folded for filing, the title of this case was written on the back, in a hand which was neither that of the reporter nor of the clerk. *Held* that this was not sufficiently identified to authorize the clerk to insert it, and that the evidence should be stricken from the record in this court.

77	73
81	640
77	73
89	403
77	73
105	512
77	73
111	219
77	73
120	635
123	115
77	73
127	700

Joy v. Bitzer.

3. **Pleading: TWO CAUSES IN ONE COUNT: NO OBJECTION: PRACTICE.** Where two causes of action are pleaded in one count, but defendant makes no objection, the court may properly submit them both to the jury.
4. **Warranty: OF SOUNDNESS OF ANIMALS SOLD: BREACH: CONTAGIOUS DISEASES: DAMAGES.** If animals sold are warranted by the vendor to be sound and free from disease in general, and are not so in fact, but are affected with a contagious disease, the warrantor is liable not only for the difference between the warranted and actual value of the animals, but for the loss occasioned, without fault on the part of the purchaser, by the communication of the disease to other stock with which the diseased animals are properly placed in the ordinary course of business, and also for such other damages and expenses as are the direct and natural result of the breach of the warranty; and it is not material that the warrantor does not know that the warranty is false, nor that it does not specify any kind or class of diseases. (See opinion for authorities.)
[REED, C. J. *dissenting*.]
5. **Special Interrogatories: ERROR IN REFUSING: CURED BY OTHER FINDINGS.** There is no prejudice from refusing special interrogatories asked, when the information sought to be elicited thereby is substantially given in special findings on other interrogatories submitted.

Appeal from Pottawattamie District Court.—HON.
GEORGE CARSON, Judge.

FILED, JANUARY 30, 1889.

ACTION to recover damages alleged to be due by reason of fraud and breach of warranty in the sale of ponies. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

J. Carskaddan, for appellant.

E. W. Tatlock, Jayne & Hoffman, and *Cloud & Doran*, for appellee.

ROBINSON, J.—The petition contains two counts. In the first it is alleged, in substance, that plaintiff purchased of defendant twenty-three ponies and one colt, for the stipulated price of five hundred and twenty-three dollars; that said ponies and colt were represented and warranted to be sound and free from contagious and

Joy v. Bitzer.

infectious diseases, and that plaintiff relied upon said representations and warranty in making the purchase; that in fact said animals were diseased with a contagious and infectious disease, from which fifteen of them died; that said disease was communicated to other stock of plaintiff, from the effects of which one horse and one pony died; that it was communicated to members of the family of plaintiff; that by reason of said disease plaintiff was put to extraordinary trouble and expense in the treatment of the ponies, and for extra feed; that plaintiff lost the consideration paid for said ponies by reason of said disease, and in addition has suffered loss and damage to his property, including stock, and to his family, in the sum of eight hundred and twenty-five dollars; that the representations concerning the ponies were false and fraudulent, and were made by defendant for the purpose of cheating and defrauding plaintiff. The second count charges the sale of two ponies to one George M. Benson for the sum of eighty dollars, with similar representation and warranty, followed by results of a like character, to the damage of Benson in the sum of nine hundred and ten dollars; that plaintiff is the owner of the claim of Benson. Judgment is demanded on the two counts for twenty-five hundred dollars, with interest and costs. The jury returned a verdict in favor of plaintiff for seven hundred dollars, on which judgment was rendered.

I. Appellee filed an additional abstract of the record, in which he denies that the evidence, and rulings on the admission of evidence, were properly preserved and made a part of the record, and denies various allegations of the abstract; and avers that there is no record of any exception taken by defendant, or ruling of the court thereon. The additional abstract also asks the attention of the court to the transcript of the record on file. Appellee contends that his additional abstract has not been denied, and that it must therefore be taken as admitted. See *Hunter v. City of Des Moines*, 74 Iowa, 215; *Ferris v. Anderson*, 72 Iowa, 420; *Armstrong v.*

1. APPEAL: denial of appellee's additional abstract: what amounts to.

Joy v. Bitzer.

Killen, 70 Iowa, 52. The appellant has not, in terms, denied the additional abstract, but he has filed the following "statement:" "The correctness of appellant's abstract of the record in this action is denied so persistently and repeatedly by counsel for appellee, that the appellant has caused a full transcript of the record of the cause in the district court to be made and certified by the clerk of the court, and filed in this court." This is followed by a demand that the costs of the transcript be taxed to appellee, and a reference to an attached index of the transcript and abstract, "by the aid of which all material facts and points for the verification of the abstract can be readily found in the transcript." These statements are not found in connection with an argument, but are included in a separate paper. It is clear that the contents of the paper, taken together, should be given the effect of a denial of the additional abstract. The correctness of the abstract is reaffirmed by necessary implication. We are therefore required to examine the transcript to determine questions raised as to the contents of the record.

II. Appellee has filed a motion to strike from the abstract so much thereof as is claimed to be the evidence in the case, on the ground that it was not properly preserved, identified, and made a part of the record, and asks that the original papers from which the abstract was made be examined. We have caused the clerk of the district court to transmit to this court the short-hand reporter's translation of evidence, which was copied in the transcript of the record now on file. It appears from the evidence now before us that the bill of exceptions signed by the judge was what is known as a "skeleton bill." It contains the following: "The plaintiff, to sustain the issues on his behalf, introduced the following evidence, as shown by the notes of the official court reporter now on file in this cause, and the said reporter's transcript and extension thereof, duly certified as such transcript. (The clerk will here insert said official certified transcript of said evidence.)" It

2. BILL of ex-
ceptions :
skeleton :
Evidence to
be inserted
must be
clearly identi-
fied.

Joy v. Bitzer.

also contains substantially the same averments in regard to the evidence introduced by defendant, and by plaintiff in rebuttal. The translation, certified to us as the one which was copied in the transcript, does not show the cause in which the evidence was given. It commences with the name of a witness, and closes with a certificate of the short-hand reporter, as follows: “*State of Iowa, Muscatine Co.* I [name], reporter of the district court of Iowa in and for Muscatine county, hereby certify the foregoing to be a full, true, and complete transcript of the testimony in said cause, from my short-hand notes thereof on file, made according to the best of my ability. [Signed.]” This certificate was written on the inside of the last leaf of the translation. On the outside was indorsed the following. “*In District Court.* Joseph E. Joy vs. Henry Bitzer. Transcript of Evidence by Official Reporter.” This was written in short lines across the ruled ones, in the manner usually adopted for marking folded legal papers, but was not in the hand-writing of the short-hand reporter, and does not appear to have been referred to in the certificate. It is evidently no part of the translation, and cannot be regarded as identifying it. It was said in *Hill v. Holloway*, 52 Iowa, 678, that “the testimony should be so immediately identified as to render it certain what is to be incorporated into the transcript, and become a part of the record, without leaving anything to the determination of the clerk or the parties.” That rule has been approved in numerous cases decided by this court. The clerk cannot be permitted to exercise a discretion as to what evidence should be included in the transcript. In this case the direction contained in the bill of exceptions would have been sufficient had the translation shown by a proper caption, or by a statement in the reporter’s certificate, that it contained the evidence given in this case. But the only showing of identity is contained in the indorsement which we have set out. That was made after the translation was completed, and is not in the handwriting of the reporter, nor even of the

Joy v. Bitzer.

clerk. In our opinion, the translation was not identified, and the motion to strike out the evidence must be sustained. *Patterson Ed. Institute v. Coad*, 74 Iowa, 710.

III. Each count alleged a cause of action founded upon fraud, and also one based upon a breach of warranty.

2. PLEADING :
two causes in
one count :
no objection :
practice. The district court ruled that plaintiff would be entitled to recover upon proof of either of these causes of action. It may be con-

ceded that the petition was vulnerable to objection on the ground that two causes of action were set out in each count, but the defendant failed to make the objection. The court, therefore, properly submitted to the jury both causes of action in each count.

IV. The court charged the jury as follows: "If you shall determine that the plaintiff is entitled to

4. WARRANTY :
of soundness
of animals
sold : breach:
contagious
diseases :
damages. recover, either for breach of warranty or for fraud, you will finally have to determine the amount of his damages, the rules in regard to which, in my judgment, are the same in either case, whether of war-

ranty or fraud." "The ordinary and matter-of-course rule of damage in such a case is that the plaintiff is entitled to recover the difference between the actual value of the property in the condition in which it was when sold and what it would have been worth if the warranty or false representation had been true." The court also charged the jury that there are "other kinds of special or extraordinary damages, sometimes flowing from such a breach of warranty or fraud, which the party injured may recover in addition, provided he shows himself to have in fact sustained them, and they appear to have been the natural and reasonable consequence of the defendant's wrong or breach of contract. Several such kinds of damage are claimed by the plaintiff in this case, and as set forth in his petition." Other portions of the charge were designed to aid the jury in determining the amount of the special damages, if any, which they might allow. The jury found specially that the sales in question were

Joy v. Bitzer.

made with a warranty that the animals sold were sound and free from disease, as alleged by plaintiff, and that the warranty was broken. The appellant contends that the court erred in stating the rule as to measure of damages in cases of warranty; that, if there was a warranty, the evidence shows that it was a general warranty; that no specific disease or ailment was mentioned by the parties, unless something was said of "surfeit," and that, under a general warranty, the limit of recovery is the difference in value between the article sold as it actually was and what it would have been had it been as warranted, and that the rule given by the court applies only in cases involving fraud. The petition alleges that the animals sold to plaintiff were warranted to be sound, and free from any contagious or infectious disease, and that those sold to Benson were warranted to be free from disease, sound, and in good, healthful condition. The jury found that these allegations were true, and since the evidence is not before us, we must presume that it sustains the findings of the jury.

It is true that, as a general rule, the measure of damages in an action brought for a breach of warranty is substantially as claimed by counsel for appellant. 1 Sedg. Dam. 290. But it is well settled that in some cases the aggrieved party may recover such additional sum as is necessary to compensate him for the direct and natural consequences of the injury. *Id.* 76, 291. "If animals sold are warranted sound, and are not so, but have an infectious or contagious disease, which they communicate to others, where the parties contemplate their being placed with other stock, the loss, not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of and doctoring them." 2 Suth. Dam. 435. See, also, *Oliph. Horses*, 211; *Pinney v. Andrus*, 41 Vt. 640; *Marsh v. Webber*, 16 Minn. 419, (Gil. 375); *Smith v. Green*, 45 Law J. C. P. 28; *Bradley v. Rea*, 14 Allen, 20; *Packard v. Slack*, 32 Vt. 10. The same rule applies in

Joy v. Bitzer.

cases of sales effected by means of fraud. *Jeffrey v. Bigelow*, 13 Wend. 523; *Faris v. Lewis*, 2 B. Mon. 375; *Brown v. Woods*, 3 Cold. 185; *Rose v. Wallace*, 11 Ind. 113; *Wintz v. Morrison*, 17 Tex. 374; *Wheeler v. Randall*, 48 Ill. 182; *Parker v. Marquis*, 64 Mo. 38. The doctrine that the measure of damages is the same in cases of breach of warranty and of fraud is indicated in the following cases: *Page v. Parker*, 43 N. H. 371; *Bradley v. Rea*, 14 Allen, 20; *Sherrod v. Langdon*, 21 Iowa, 519; *Likes v. Baer*, 8 Iowa, 370. See, also, Sedg. Dam. 295, note c; Oliph. Horses, 211. It has been held that the right of recovery does not depend upon knowledge on the part of the seller, at the time of the sale, that the purchaser designs to place the stock purchased with other animals. *Sherrod v. Langdon*, *supra*; *Packard v. Slack*, 32 Vt. 12. So far as we can determine the facts of the case from the record, the portions of the charge under consideration were correct. The warrantor of animals sold should be held liable on his covenants for all the direct and natural consequences of their breach. If the animals are warranted to be sound and free from disease, and are not so in fact, the warrantor should be held liable for the loss occasioned without fault on the part of the purchaser, by the communication of the disease to other stock with which the diseased animals are properly placed, in the ordinary course of business, and also for such other damages and expenses as are the direct and natural result of the breach of warranty. In our opinion, it is not material that the seller does not know that his warranty is false, nor that it does not specify any kind or class of diseases. A warranty that an animal is sound and free from disease is necessarily a warranty against diseases of all kinds.

V. Appellant complains of the refusal of the court to submit to the jury certain special interrogatories asked on his behalf. In answer to this complaint, it is only necessary to say that the information sought by the interrogatories refused was substantially given

5. SPECIAL INTERROGATORIES: error in refusing: cured by other findings.

Joy v. Bitzer.

in special findings returned by the jury on interrogatories submitted by the court; hence no prejudice could have resulted from the refusal.

VI. Numerous questions are discussed by counsel which cannot be determined without reference to the evidence. Since that is not before us, such questions must be disregarded. We have examined all objections not already noted, but find no error of the court prejudicial to appellant. The judgment of the district court is

AFFIRMED.

REED, C. J., (*dissenting.*)—I dissent from the holding of the majority in the fourth paragraph of the foregoing opinion. If the case rested alone on the first count of the petition, I would be satisfied with the result reached. That count alleges the breach of a warranty against contagious diseases, and, as the evidence is not before us, we must presume that as to that allegation the instruction was adapted to the proof before the jury. I agree that where the vendor of domestic animals warrants them free from infectious or contagious diseases, he is liable, in case of a breach, for the injury which is occasioned by the communication of the disease to other animals with which those sold were commingled. But the opinion of the majority goes much further than that. The second count alleges the breach of a general warranty of soundness, and the holding is that the vendor is liable under such a warranty for the injury occasioned to other animals by the communication to them of the disease with which those sold were infected, as well as for the difference between the actual and warranted value of the animals. I do not agree to that. The action is on the contract. In case of the breach of a contract, the liability of the covenantor is to be determined with reference to those matters which the parties are presumed to have had in mind when they entered into the agreement. That this is the general rule on the subject will not be denied. When the vendor in the sale of domestic animals warrants them free from infectious diseases, the injury

Springfield Engine & Thresher Co. v. Van Brunt.

resulting from the communication of such diseases to other animals is a matter within the contemplation of the parties. In case of the breach of such warranty, the vendor is liable for an injury of that kind, because it is the very injury against which he warranted. But a mere general warranty of soundness is different. Such a warranty relates simply to the property which is the subject of the sale. By it the covenantor undertakes simply that the property is of a certain quality, and that he will answer, in case it proves otherwise, for the difference between its actual value and what that value would have been if it had been as warranted. The consequential damage resulting from the communication of diseases to other animals is not covered by the terms of the agreement. The vendor does not by his agreement undertake to answer for such an injury, nor does the vendee contract for indemnity against it. It is not a matter within the contemplation of the parties when they enter into the agreement. Some of the authorities cited in the opinion appear to sustain the view of the majority, but in my judgment they violate elementary principles of the law. Others, it appears to me, are not in point.

THE SPRINGFIELD ENGINE & THRESHER COMPANY V.
VAN BRUNT *et al.*

1. **Guaranty: OF NOTES SIGNED WITH FICTITIOUS NAMES: REASONABLE DILIGENCE AS DEFENSE.** The agents of the plaintiff for the sale of their goods, by the contract of agency, guaranteed all notes taken for goods to be good when taken. They took the notes in suit, signed with fictitious names, and the persons who so signed them were insolvent at the time. *Held* that reasonable diligence on the part of the agents in taking the notes, while it might relieve them from responsibility on account of the deception practiced by the makers in signing fictitious names, would not discharge them from liability on their guaranty, and that an instruction which in effect held that it would, was erroneous.

Springfield Engine & Thresher Co. v. Van Brunt.

2. ——— : DISCHARGE BY SETTLEMENT: INSTRUCTION. In such case, the agents pleaded a settlement as discharging them from liability on their guaranty, but plaintiff replied that if there was a settlement as to the notes in question it was made in ignorance of the facts concerning the notes, and in the belief, founded upon the representations of the agents, that the names subscribed to the notes were genuine, and that the makers were solvent; and there was evidence tending to support the reply. *Held* that if the reply was true it constituted a good defense to the settlement, and that an instruction to the jury, that if they found there was a settlement they should find for defendant, was erroneous.

Appeal from Pottawattamie District Court.—HON.
GEORGE CARSON, Judge.

FILED, JANUARY 30, 1889.

ACTION against the makers and guarantors of promissory notes. There was a judgment upon a verdict for defendants. Plaintiff appeals.

Fremont Benjamin, for appellant.

Flickinger Bros., for appellees.

BECK, J.—I. The petition alleges that R. D. Green and Thomas Alexander, under the fictitious names of David Green and Thomas Beaty, executed to plaintiff certain promissory notes, copies of which are set out in the petition. The defendants R. D. Green and Thomas Alexander are charged in this action as the makers of the notes. The petition alleges that the other defendants, the Van Brunts, as the agents of plaintiff, sold to Green and Alexander a horse-power and separator, and received in payment therefor the notes in suit. The Van Brunts entered into a written contract between themselves and plaintiff wherein they undertook to act as agents for plaintiff in the sale of farm machinery. This contract contains a condition to the effect that the Van Brunts “will guarantee all notes good when taken by them, and will attend to the collection, when necessary, * * * and remit” to plaintiff “all notes

1. GUARANTY:
of notes
signed with
fictitious
names: rea-
sonable dili-
gence as
defense.

and moneys, as fast as machines sold are paid for." Other conditions of this contract need not here be set out. The petition alleges that the Van Brunts were guilty of extreme negligence in taking the notes signed in fictitious names, and that R. D. Green and Thomas Alexander, the other defendants herein, at the time of the execution of the notes, were wholly insolvent, and so remain.

II. The district court gave to the jury the following instruction: "(4) If you find that the makers of the notes in controversy signed the same under names assumed, and not real names, and if you find that defendants exercised reasonable diligence as ordinarily prudent men, and if you find that such property was in fact obtained by false pretense from the defendants, and that reasonable prudence was exercised, then, in law, defendants would not be liable upon such notes so guaranteed, if so done, for in law an agent or bailee of a party is only liable for want of reasonable care and prudence." This instruction is to the effect that defendants, the Van Brunts, are not bound by their guaranty if they exercised reasonable prudence in taking the notes. It may be that defendants would be relieved of liability on their guaranty so far as liability might arise by reason of the failure to recover on the notes by reason of the fictitious signatures. But, as the parties signing the notes are liable notwithstanding the fictitious signatures, it is difficult to see how defendants could be relieved under the rule of the instruction. It is clear that the instruction, so far as it may apply to the fictitious signatures, is practically of no benefit to defendants, and of no avail in the case. It ought not to have been given. But the language of the instruction is so broad that it applies to the guaranty, so far as it is against insolvency, or any other thing which will defeat recovery on the notes. It is plain that prudence in taking the notes, so far as the fictitious names are concerned, would not relieve defendants from liability on their absolute guaranty which might arise on account of the insolvency of the makers of the notes. As we have

seen, the matter of the fictitious signatures cuts but a small figure in the case, for the real makers of the notes will be liable thereon notwithstanding they signed them in false names. Plaintiff's rights in this regard only depend on a matter of proof. The grave error and prejudice is at once seen when the instruction is understood according to its undoubted meaning, which is to the effect that defendants will not be liable on their guaranty in case they were prudent in accepting the notes in view of the fictitious signatures.

III. The defendants, the Van Brunts, in their answer, pleaded that they were released and discharged upon a settlement between the parties. The plaintiff replied to this allegation of the answer in the following language: "Plaintiff denies that there was a full and complete settlement or satisfaction of the matters and liabilities arising under and growing out of the contract attached to plaintiff's petition, made by defendants; and denies that defendants were released or discharged from any or all liabilities arising therefrom. And plaintiff states that if any such settlement or satisfaction was made the same was made without any knowledge on the part of plaintiff that the makers of the notes described in plaintiff's petition were not responsible financially at the time the notes were taken, and without any knowledge that the notes were signed by fictitious names, and upon the information and belief that the makers of said notes were residents of said Pottawattamie county, Iowa, and upon the representations by defendants that the makers of the notes were amply responsible for the amount thereof." As applicable to the issue thus raised, the court directed the jury that if they found that there was a settlement they should find for defendants. But the court failed to direct the jury that if they found the matters pleaded by plaintiff in reply to the answer setting up the settlement they should not find for defendants on the ground of the settlement. Surely, if plaintiff did not know of the insolvency of the makers of the notes, and was induced to believe that they were solvent by the

2. —: dis-
charge by set-
tlement:
instruction.

declarations of the Van Brunts, the settlement should be disregarded. The court should have properly directed the jury upon this issue. The fraudulent representations of the Van Brunts to the effect that the makers of the notes were solvent, if proved, would defeat the settlement; for a fraud of that character will defeat all agreements. The law will not provide rewards for frauds by enforcing agreements based thereon. "Fraud vitiates all contracts, and may therefore be shown by parol evidence, although its effect will be to vary or contradict a written instrument." *Day v. Lown*, 51 Iowa, 364. There was evidence tending to show the fraud, to which a proper instruction on the subject would have been applicable.

Other questions arising in the case need not be considered, as the judgment of the court below for the errors pointed out must be

REVERSED.

BARTLETT V. THE IOWA STATE INSURANCE COMPANY.

Fire Insurance: ACTION ON POLICY: BY MORTGAGES: PLEADING. The policy in question was issued to plaintiff's husband upon property on which she held a mortgage, and the loss, if any, was made payable to mortgagees. She was the only mortgagee at the time of the fire, and after the fire he transferred the lot on which the insured building stood to her in consideration of the amount due on the mortgage, and afterwards the mortgage was cancelled. *Held* that she had a right of action on the policy as a mortgagee, and that she was not divested of that right by the purchase of the lot and the cancellation of the mortgage, and that it was not necessary for her to state in her petition the facts relating to the transfer of the property after the fire.

Appeal from Muscatine District Court.—HON. A. J. LEFFINGWELL, Judge.

FILED, JANUARY 31, 1889.

77	86
111	596
77	86
117	78

ACTION upon a policy of insurance against loss by fire. There was a trial by the court without a jury, and a judgment for defendant for costs. Plaintiff appeals.

E. F. Richman, for appellant.

J. Carskaddan and *Craig, McCrary & Craig*, for appellee.

ROTHROCK, J.—The policy of insurance upon which the suit is founded was issued to Martin Bartlett on the eleventh day of February, 1884. The property insured was destroyed by fire on the third day of July, 1886, which was during the life of the policy. At the time the insurance was effected, Bartlett was indebted to the plaintiff, who is his wife, in the sum of about twelve thousand dollars; and she held a mortgage upon the insured property, and upon other property, to secure the payment of the indebtedness. The policy contained this provision: "Loss, if any, payable to mortgagees as their interest may appear." At the time of the fire, no part of the mortgage debt had been paid. On the thirty-first day of August, 1886, Martin Bartlett conveyed the lot upon which the burned building was situated to the plaintiff. The consideration named in the deed was the amount due on the mortgage. On the nineteenth day of July, 1887, the mortgage was satisfied of record.

There is no doubt that the plaintiff, as the mortgagee, had the right to maintain the action. There was no other mortgage upon the property, and she was the real party in interest. See *Mershon v. Ins. Co.*, 34 Iowa, 87. Her relation to the policy as a mortgagee is averred in the petition; and while it is not therein stated, in express terms, that she sues as mortgagee, yet that may be inferred from what is stated.

But the defendant insists that plaintiff had no right to maintain the action, because there was no mortgage, it having been paid and satisfied; but the evidence shows that, when the mortgage was settled between the parties, plaintiff took the policy and the burned property for

Read v. Divilbliss.

the debt. She was the real party in interest still, notwithstanding she had given up her mortgage. She did not give up the policy, in which she was always the real party in interest. It is to be observed that this transfer of the property occurred after the loss, and when the plaintiff's policy had become a matured obligation. The court adjudged that "the plaintiff could not have and maintain her said action." From this we infer that it was thought she had no right of action. This must have been the holding, for there is no other defense developed in either record or argument.

The plaintiff was defeated in the action because of a supposed defect in her petition. It may be that she should have set out the facts as to the transfer of the title of the property to her after the fire, but we do not think that this was necessary. The defense relied upon may be a convenient one for the purposes of promoting litigation, but it ought not to prevail as against what appears to be an honest loss upon a contract which it is admitted was fairly made.

REVERSED.

READ V. DIVILBLISS.

Appeal: QUESTIONS REVIEWED: EVIDENCE WANTING. Where the evidence is not set out in the abstract, this court cannot review alleged errors whose existence can be determined only by reference to the evidence; and in such case the judgment must be affirmed, because error must be shown by the record. (See opinion for illustration.)

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, JANUARY 31, 1889.

ACTION by a landlord against his tenant to recover rent, and to enforce a specific lien therefor on certain

Read v. Divilbliss.

personal property. The cause was tried to the court, and a judgment rendered in favor of plaintiff for \$194.25 and costs. The judgment also gave to plaintiff a lien on one horse, one mare, harness, wagon, farming implements, two loads of hay, two hogs, and tools in meat-shop, seized under a writ of attachment; and ordered that a special execution issue for the sale thereof, and a general execution for any balance remaining unpaid after the sale under the special execution. On the motion of defendant for a new trial, the court set aside so much of the judgment as found, and established a lien, and ordered a special execution. From that action of the court the plaintiff appeals.

Read & Read, for appellant.

Cummins & Wright, for appellee.

ROBINSON, J.—The court below found specially that it was agreed between the parties hereto that plaintiff should have a lien upon a team of horses, a wagon, harness, and other farming implements, which would otherwise be exempt from execution; that one of the horses was not owned by defendant at the time the agreement was made; but that it was agreed that, after he should have purchased it, he should execute to plaintiff a mortgage on said property to secure the claim for rent, which security was to be in addition to the landlord's lien; that defendant occupied the leased premises during the season for which they were leased; that he is a married man, the head of a family, a resident of Iowa, and was engaged in farming; that a writ of attachment was issued and levied upon two horses, one wagon, one set of double harness, one hay-rake, one mower, two loads of hay, two hogs, and a lot of meat in a meat market, and a lot of butcher's tools, on the twenty-seventh day of December, 1887, and that thereafter a landlord's attachment was issued and levied upon the same property; that before this action was brought

Troxel v. The City of Vinton.

defendant refused to execute the mortgage; and that the amount for which judgment was rendered was due for rent which accrued under the lease.

Whether the agreement for a special lien upon which appellant relies was sufficient to accomplish the purpose for which it was intended is a question which we do not find it necessary to determine. One ground of the motion to set aside the judgment, and for a new trial, was that the finding and judgment of the court were contrary to the evidence. Another was that there was no evidence that the property levied upon was subjected to any specific lien by the defendant in favor of the plaintiff. Another was that the property levied upon was exempt from execution under the laws of the state, and there was no evidence that defendant waived such exemption. Another was that the court erred in holding that the evidence established a lien upon the property attached in favor of the plaintiff. None of the evidence submitted on the trial is set out in the abstract; hence, so far as we are advised, each of the grounds named for setting aside the judgment was well taken. The special findings of the court indicate nothing to the contrary. The evidence may not have sustained them. Furthermore, the court did not find that the property upon which the attachments were levied, and, which was referred to in the judgment, was the identical property in reference to which the alleged agreement for additional security was made. It is clear that the showing made by the record is such that the action of the district court cannot be disturbed. It is therefore

AFFIRMED.

77	90
91	49

TROXEL V. THE CITY OF VINTON.

1. **Verdict: CONFLICTING EVIDENCE.** This court will not reverse a judgment upon a verdict based on conflicting evidence on the ground that there was not sufficient evidence to warrant the verdict.

Troxel v. The City of Vinton.

2. **Cities and Towns: INJURY ON DEFECTIVE WALK: CONTRIBUTORY NEGLIGENCE.** Plaintiff's wife was injured by a defect in defendant's sidewalk. She knew that the walk was out of repair, but it does not appear that she knew or thought that it was dangerous, and it was the only walk leading from her home to where she was going. *Held* that she could not be charged as matter of law with contributory negligence on the ground that she used it knowing that it was out of repair. (See opinion for cases distinguished.)
8. **Appeal: REVIEW: QUESTION NOT SUBMITTED TO JURY.** In an action for an injury on account of a defective sidewalk, the court in an instruction called the attention of the jury to the question of enhanced damages resulting from a fall subsequent to the accident, but not to such damages resulting from an improper use of the injured limb after the accident. The instruction was not excepted to, and no other was asked on the subject. *Held* that the instruction as given was the law of the case, and limits the inquiry of this court to the subject as presented by it, and prevents any inquiry as to whether she was negligent in the use of the injured limb after the injury.

Appeal from Benton District Court.—HON. L. G. KINNE, Judge.

FILED, JANUARY 31, 1889.

IN June, 1886, Mrs. Sarah Troxel, the wife of the plaintiff, was injured while passing over a sidewalk in the defendant city, and this action was brought by the husband to recover damages. There was a trial to a jury, a verdict and judgment for the plaintiff, and the defendant appeals.

J. C. Traer, for appellant.

J. D. Nichols, for appellee.

GRANGER, J.—No errors are assigned as to the instructions of the court, and the questions for consideration are entirely with reference to the testimony.

I. Appellant first insists that the verdict is not supported by a fair preponderance of testimony. The testimony in the case is brief, and we have carefully examined it. It is true that while

1. VERDICT: conflicting evidence.

Troxel v. The City of Vinton.

three witnesses, including the plaintiff and his wife, testify to the bad condition of the walk, there are five who testify that they frequently passed over it, and noticed nothing wrong. That the walk was, on the eighth of June, when the accident occurred, out of repair, there can be no reasonable doubt. This fact adds something to the force of the evidence that it was for some time before out of repair. It is unquestioned that in the fall of 1885 the plaintiff called the attention of Mr. Means—one of the six witnesses, and at the time one of the officers of the city—to the defect, and particularly called his attention to the approach at the woodshed, where the accident happened. He (Means) then served a notice on Mrs. Butler, the owner of the abutting property, to repair the sidewalk. Mr. Means, in his testimony, says that Mrs. Butler made no change in the walk that he knew of. He also says he discovered nothing wrong with the walk, and that he made no special examination. Three of the witnesses testify that from in the spring the walk was not firm, and that to walk on the side it would “tilt or teeter,” that some of the planks were loose, and it is true that a loose plank caused the accident to Mrs. Troxel. Thus we find that there is some testimony that the walk was out of repair in the fall of 1885, and more that it was from the spring of 1886. The testimony is that one passing along the center of the walk would not notice any defect. This might account for the fact that only a part of those who passed over it noticed a defect. To us it seems that there is a plain conflict of evidence, and that the question of whether or not the walk was out of repair was one for the jury.

II. It is next urged that the condition of the walk was not such as to impart constructive notice to the defendant. The consideration of this question is so akin to the former that it should hardly command further notice. There is some testimony tending to show actual notice. We refer to the complaint or talk of the plaintiff with Mr. Means in October, 1885, which led to a notice on the abutting property owner to

2. THE SAME.

Troxel v. The City of Vinton.

repair the walk. It is by no means clear that such a notice did not require a particular examination of the walk to know its condition. But, without so holding, it is sufficient to say that the testimony is of a character to make the question of notice one for the jury.

III. At the close of the testimony the defendant moved the court to instruct the jury to return a verdict for the defendant, for the reason that the undisputed testimony of the plaintiff's wife shows that the accident occurred in consequence of her contributory negligence. The

2. Cities and towns: injury on defective walk: contributory negligence.

motion was overruled, and such ruling is assigned as error. Mrs. Troxel's testimony as to how the injury occurred is as follows: "I reside at Vinton. Am wife of plaintiff. Am forty-eight years of age. During the year 1885, and until June, 1886, lived in the southeast part of town, straight east of the Blind Asylum. I know where Asylum avenue is. The house where I lived was directly east of the College for the Blind, and on the south side. There was a sidewalk all the way from where I lived to the College for the Blind, on the same side. I remember going to a concert at the college about the eighth of June, 1886. I know where the property known as the 'Butler property' is located. It was five blocks west of us, on the south side of the street. My daughter Lillie went with me to the concert. On the evening of the eighth of June, 1886, I went to the concert. I was injured on the sidewalk at Butler's barn or wood-house,—I don't know which it is. There was a window in the north side of the wood-house. It must have been a little east of the window,—close about the window; between it and the corner. I was injured on the walk on the south side, next the wood-house. Was going west. We were on the walk. I stepped on a plank, and my daughter stepped on the other side, and tripped me against the barn, and threw my foot sideways. It appeared as if it was thrown out of joint. I had noticed that this walk was out of repair before the accident; that the stringers were loose, and the section (I guess it is called) was loose, and teetered. I had been over the

Troxel v. The City of Vinton.

walk during the spring of 1886 frequently. I can't say how many times. I was walking carefully at the time. Never had any trouble before." On cross-examination she testified as follows: "I live five blocks east of where the Butler property is; on the same street. Can't state what time I left home that night; it was between sundown and dark; I think it was about eight o'clock. My daughter and I were together. We started along the sidewalk past Butler's property. We walked side by side. We did not have hold of each other. Did not walk very fast. Don't recollect just what time we got to asylum; think it was dusk. Do not recollect talking to my daughter. Did not call her attention to this place in the walk as being bad. I think I stated before that when we got to the bad place in the walk that we walked right along in the usual way. I stepped on one end of the plank, and my daughter on the other. I can't tell how it was. Something happened,—the plank, I thought, came up, and caught my foot, and threw me against the building. The plank was drawn around. I did not notice much about the condition of the walk that evening. It teetered a little; that is, it rocked. I do not know how long we stayed there after the injury." In support of the assignment we are referred to *McLaury v. City of McGregor*, 54 Iowa, 717; and *Hartman v. City of Muscatine*, 70 Iowa, 511. In the case of *McLaury v. City of McGregor*, the plaintiff was injured by stepping off the walk into a ditch, and a brief extract from the opinion will show the nature of the case. The court says: "It appears to us that where a person is walking upon a sidewalk as wide as this one, and is in the enjoyment of such degree of light and such eyesight as to be able to discern it, and steps off by inadvertence or want of attention, and receives an injury, such person cannot be said to be in the exercise of reasonable care." It will be observed that this is a case where there was a sufficient walk for the use of plaintiff, and by her own inadvertence or negligence she stepped off the walk into the ditch. In the case of *Hartman v. City of Muscatine*, there was what was known to be a

Troxel v. The City of Vinton.

dangerous crossing, and the plaintiff chose to take that route, instead of another equally available to him. The plaintiff in that case testified that he knew that it was dangerous when he attempted to cross it; and the court says that, as a matter of law, the plaintiff acted imprudently, and that he could not recover. In the case at bar there was no such admission on the part of Mrs. Troxel. She knew that the walk was not in good repair, but there is nothing to show that she regarded it as dangerous. She passed over it frequently, and others passed over it daily without mishap. She says that at the time of the accident she was walking in the usual way; that she was walking carefully. This, it appears was the only walk leading to the place of her destination that evening. This case is widely different in its facts from the cases referred to. This is a case, like many others, where a defective walk,—known to be so,—but not regarded as dangerous, is used for a time with safety, and then, for some cause that is not and could not be anticipated, an accident results. The rule laid down in *Kendall v. City of Albia*, 73 Iowa, 241, seems to have been followed by the court in this case as to contributory negligence, and the condition of the evidence is not such as to warrant our interference.

IV. It is next claimed that the plaintiff's wife was negligent in the manner in which she used the injured limb. Upon that branch of the case the

8. **APPEAL :**
review : ques-
tion not sub-
mitted to
jury.

court gave to the jury the following instruction: "(9) If you find from the evidence that plaintiff's wife was injured by a defect in the sidewalk, as claimed, without any negligence on her part which contributed thereto, and that defendant had notice of such defect as hereinbefore explained, and that plaintiff has suffered damages thereby; and if you further find that afterwards plaintiff's said wife fell, and again injured her limb, and said last fall enhanced or increased said original injury, whereby further medicine and medical attendance was required, and whereby further loss of services of plaintiff's said

Troxel v. The City of Vinton.

wife resulted to him than would have resulted from the original injury,—then as to such medicine and medical attendance or further loss of time plaintiff cannot recover unless you find that said last fall, if any, was produced or caused by said original injury, and without any fault or negligence on the part of plaintiff's said wife." This is the only instruction to the jury relative to the wife's conduct after the injury, and no question is made as to the instructions given, or that any were refused. It will be observed that the instruction only calls the attention of the jury to the question of enhanced damages resulting from a fall; not to such damage on account of excessive walking or other misuse of the limb after the injury. The instruction, as given, is the law of this case, and limits our inquiry to the subject as presented by it; that is, we only look to the testimony relative to injury by the fall. If the appellant desired more, an instruction should have been asked.

The foregoing disposes of all the material questions presented in the record, and the judgment is

AFFIRMED.

Scovil v. Fisher.

SCOVIL V. FISHER.

77	97
88	108
88	638

1. **Judgment: JURISDICTION: RECITALS: APPEARANCE OF COUNSEL: EVIDENCE: PRESUMPTION.** R. began an action against P. to foreclose a mortgage, and made S., who held one of the mortgage notes, a party. S., in a cross-petition, asked for judgment on his note and for a foreclosure of the mortgage; and a personal judgment was rendered in his favor against P., although P. was served with notice of the cross-petition by publication only, and the decree recited that he appeared neither in person nor by attorney. In an action to enforce the judgment against P.'s administrator, it was shown by the record that attorneys appeared for P. in the case at a term prior to that at which the judgment was entered, and one of the attorneys testified that his firm appeared in that case for P. But it appeared that these attorneys appeared also for S. in the case. *Held* that, if this evidence was admissible at all as against the recitals in the decree, it must be regarded as showing only that these attorneys appeared for P. in the original case, and not as to the cross-petition, because they could not lawfully have appeared for both S., the plaintiff in the cross-petition, and P., the defendant therein; and the court will entertain presumptions in favor of the lawful conduct of attorneys, and of the truthfulness and consistency of judicial records. Consequently, *held*, further, that the personal judgment was invalid for want of jurisdiction to render it.
2. **Pleading: CLAIMS AGAINST ESTATES: DENIAL PRESUMED.** In an action upon a judgment as a claim against an estate, no answer is necessary, but the administrator, by resisting the claim, not only puts in issue the validity of the judgment, but of the debt on which it is founded, so that no recitals of the judgment are to be regarded as *prima-facie* evidence against him because not denied.

Appeal from Kossuth District Court.—HON. LOT THOMAS, Judge.

FILED, JANUARY 31, 1889.

THE plaintiff, Scovil, filed in the district court, sitting as a court of probate, a claim against the estate of Lorenzo Price, based on a judgment of the district court of Dallas county. Upon a trial on the merits the claim was disallowed and rejected. Plaintiff appeals.

VOL. 77—7

H. E. Long, for appellant

George E. Clarke, for appellee.

BECK, J.—I. The judgment which is the foundation of plaintiff's claim was rendered in an action to foreclose a mortgage, brought by one Richard against Price and wife, the mortgagors, the plaintiff in this suit, Scovil, who held a note secured by the mortgage, and others, who claimed some interest in the real estate covered by the mortgage. Scovil filed a cross-bill, asking a foreclosure of the mortgage, and a judgment on his note. The notice to the mortgagor Price of the filing of the cross-bill was given by publication. The decree declares that Price appeared neither in person nor by an attorney, but a personal judgment is rendered against him for the amount due on the note. This is the judgment filed as the foundation of plaintiff's claim.

II. It is not, and cannot be, claimed that the judgment in question is *in personam*, and bound Price or his property other than as a judgment *in rem*. But it is insisted that the evidence shows that Price appeared in the action by attorney, and therefore he should be held bound personally by the judgment. We think that the evidence fails to overcome the decree which declares that the court found that defendant Price appeared neither in person nor by attorney, if, indeed, it is not conclusive, and may be contradicted by evidence *dehors* the record. The record at a prior term recites that attorneys entered their appearance for Price. But it is not shown that the appearance was to the cross-bill. The appearance, doubtless, was to the original action, and not to the cross-bill. This conclusion is supported by the fact that the attorneys entering their appearance for Price were in fact, as is shown by the decree and the papers in the case, the attorneys of Scovil, the plaintiff in this case. It is not to be presumed

Scovil v. Fisher.

that respectable attorneys would appear both for Scovil and Price, the plaintiff and defendant in the cross-bill, or that the court would permit such a thing.

III. One of the attorneys testifies that his firm did appear in the case for the defendants,—Price among the number. He does not testify that he appeared to the cross-bill for Price. He could have properly appeared in the case for Price in resistance to the original petition, but he could not have appeared lawfully in resistance to the cross-bill. The law will presume he did not appear to the cross-bill for Price. The record will thus be consistent with itself, and all parts of it will stand, and it will appear that the attorneys did not violate their professional duty by appearing both for the plaintiffs and defendant in the cross-bill.

IV. Counsel for plaintiff insist that, conceding the judgment is *in rem*, the findings shown therein are *prima-facie* evidence of the amount due plaintiff, in view of the fact that there is no denial of the original debt. But as there was no written answer to the claim, in accord with the practice in such cases, wherein no formal pleadings are required, the resistance of the defendant put in issue all matters upon which a defense to the claim could be based, usually set up by a general denial. It is not to be presumed that defendant admitted plaintiff's right to recover, or the validity of his claim. The claim was based on the judgment, which is invalid, and not binding as a judgment *in personam*. The judgment, therefore, does not support plaintiff's right to recover in this action; and even if counsel's position, that it is *prima-facie* evidence of the amount of the claim, be correct,—which we do not hold,—plaintiff cannot recover, for the reason that the judgment and other evidence does not establish his cause of action. In our opinion the judgment of the district court ought to be

AFFIRMED.

2. PLEADING :
claims against
estates :
denial pre-
sumed.

THE EMPIRE MILL COMPANY V. LOVELL

1. **Attachment: WRONGFUL: SALE OF PROPERTY UNDER: DAMAGES.** When a debtor's goods are wrongfully seized and sold under an attachment, but the proceeds are applied to the payment of his debts, the measure of his damages for the wrongful attachment is not the value of the goods when seized, but the difference between that value and the amount realized upon their sale.
2. **Agency: ADMISSIONS OF AGENT TO BIND PRINCIPAL.** The statements and admissions of an agent are not admissible in evidence against the principal, unless they are made at the time of the transaction to which they relate, and such transaction is within the scope of the agent's employment. Accordingly *held* that the statements of one of plaintiff's attorneys, made after the attachment in this case was sued out, were not admissible as against plaintiff to show malice in suing out the writ.
3. **Evidence: IRRELEVANT BUT HARMLESS.** A cause will not be reversed for error in admitting irrelevant evidence, when it appears that no possible prejudice could result therefrom to appellant.

Appeal from Wright District Court.—HON. S. M. WEAVER, Judge.

FILED, JANUARY 31, 1889.

PLAINTIFF brought suit on a money demand, and sued out a writ of attachment. Defendant pleaded a counter-claim on the attachment bond for the wrongful suing out of the writ, on which he recovered. Plaintiff appeals.

Pillsbury, Moats & Moats, for appellant.

Cook & Filkins and *J. G. McOllough*, for appellee.

REED, C. J.—I. The property seized on the attachment was a stock of merchandise. On the day following that on which the writ was levied, defendant confessed judgment in favor of another creditor. An execution issued on that judgment was levied on the stock, and it

1. **ATTACHMENT:**
wrongful: sale
of property
under: dama-
ges.

was sold thereon; and at the time of the trial the proceeds were held by the sheriff to be applied as the court might direct. The court instructed that, if the attachment was wrongfully sued out, the measure of defendant's actual damages would be the fair market value of the property at the time of the seizure. We are of the opinion that the rule adopted by the court on that question is erroneous. The injustice which would result from the application of such a rule is well illustrated by the present case. By the verdict and judgment defendant recovers the full value of the property, which is in excess of the amount of his indebtedness to plaintiffs; the judgment being in his favor for the difference between those amounts. He also has the benefit of the proceeds of the sale, which may now be applied in satisfaction of the judgment in favor of the other creditor. The proceeds amounted to about one-half the value of the goods as shown by the invoice taken when the seizure was made; and the result, under the rule, is that while, by the findings of the jury, the issuance of the writ was wrongful, defendant has been benefited by the seizure to the extent of one-half the value of the property taken; and the same result would have followed if the sale had been made under the attachment because of the perishable character of the goods. The debt to plaintiff would have been extinguished by the assessment against him of the value of the property at the time of the seizure, while the proceeds of the sale would have gone to defendant. It is manifest that in either case his recovery because of the wrong done him by the seizure of his property would be in excess of the actual damages caused by the act. But the true measure of his actual damages is such sum as will compensate him for the injury; and in the present case that sum could not exceed the difference between the market value of the property at the time of the seizure and the amount realized from the sale; and the rule would be the same if the difference should be less than the amount of the indebtedness to plaintiff, and a portion or all of the proceeds should ultimately go to the satisfaction of

The Empire Mill Co. v. Lovell.

that balance, for in that case defendant would have the benefit of it in the satisfaction of his indebtedness. The seizure of property under an attachment is not of itself an absolute conversion of it. The owner is deprived of possession by the seizure, and, if wrongful, he may maintain an action for the trespass, but he is not divested of his title or ownership by the seizure alone. There must be a sale under the proceeding before that result is accomplished. If the seizure was wrongful, he is entitled to be compensated for the injury caused thereby. Before sale the injury consists simply in the consequences of the deprivation of possession, including any depreciation in the value of the property. If the proceeds of the sale will inure either directly to him, or indirectly to his benefit, as when applied to the satisfaction of an indebtedness, the actual damages cannot exceed the difference between the proceeds of the sale and the value of the property at the time of the seizure.

II. Plaintiff is a non-resident of the state, and the proceedings were instituted by its attorneys resident in the state; the petition being sworn to by one member of the firm employed in the case. There was evidence proper to go to the jury that the attorney who verified the petition, and who did all that was done in the matter, was actuated by malice towards defendant; and the court directed the jury that the motive of the attorney, if proven, would be imputed to plaintiff. Against plaintiff's objection, defendant was permitted to give evidence of certain statements of another member of the firm (of attorneys) made after the attachment was sued out, which tended in some degree to show the motive of his partner in suing it out. The evidence should have been excluded. It may be conceded that the one making the statements was responsible for the suing of the writ, because the act was done by his firm. The declarations, however, were not of the *res gestæ*, and the statements and admissions of an agent are not admissible against the principal, except they are made at the time of the

2. Agent's admissions of agent to bind principal.

Burtis v. Humboldt County Bank.

transaction to which they relate, and such transaction is within the scope of the agent's employment. The declarations in question related to a past transaction.

III. Defendant, when being examined as a witness in his own behalf, was inquired of as to his motive in confessing judgment in favor of the other creditor, and, against plaintiff's objection, was permitted to answer that he desired to secure to him the debt he was owing. The evidence, perhaps, was irrelevant, but we can see no possible prejudice which could have resulted from its admission. It could have no possible bearing on the questions involved in the issue, which related to the truth of the allegations of the petition for attachment, and the jury could not have been misled or influenced in their finding on these questions by it. As we reach the conclusion that the judgment must be reversed on the grounds indicated, we will not consider the question as to the sufficiency of the evidence to sustain the verdict.

REVERSED.

BURTIS V. THE HUMBOLDT COUNTY BANK *et al.*

77	103
97	421

1. **Fraudulent Conveyance: INNOCENT GRANTEEES.** If the vendor of the property in this case be conceded to have transferred it with a fraudulent intent, *held* that the evidence fails to show any participation in or knowledge of that intent on the part of the vendee, and that its title cannot be set aside on that ground.
2. **Agricultural College: LANDS OF: SALE FOR CASH.** Although agricultural college lands are required to be sold on time, in order to provide a fund for the college arising from the interest on the purchase price, the college may nevertheless receive the principal, with a *bonus*, when its interests will be promoted thereby; and where it does receive the principal, it will be presumed that its officers have acted rightly for the best interests of the college.

Appeal from Humboldt District Court.—HON. GEORGE H. CARR, Judge.

FILED, JANUARY 31, 1889.

ACTION in chancery to quiet and establish title in plaintiff to a certain tract of land. Upon a trial on the merits plaintiff's petition was dismissed. He now appeals to this court.

J. C. Raymond, for appellant.

P. Finch, for appellees.

BECK, J.—I. The petition alleges that plaintiff purchased at sheriff's sale, under a judgment against one Williams and wife, the interest which they held in certain land under a lease to them by the agricultural college. It is shown that plaintiff was the assignee of the judgment, and that the wife, to whom the lease was executed, before the suit was commenced in which the judgment was rendered under which plaintiff claims, assigned the lease to Mattison, who, before the judgment was rendered, assigned the lease to the Humboldt County Bank, which procured a patent to be issued to it for the land; and that the other defendants hold an interest in the land under the bank. It is alleged that these assignments and transfers were made to defeat the creditors of Williams and wife, of which the bank had full notice. The plaintiff asks that defendants' claim and title to the land be set aside, and that it be quieted in plaintiff.

II. There can be no dispute as to the rules of law prevailing in this case; and we think, after a careful consideration of the evidence, there ought not to be disagreement as to the controlling facts of the case. If it be conceded that Williams and wife by the transfers of the lease intended to defeat their creditors, the evidence fails to show that the bank and the other defendant shared that purpose. The evidence leads to the conclusion that the bank acquired the lease in good faith in payment of a claim it held against Williams and wife. We think that the evidence utterly fails to show that the bank, through its officers or agents, had knowledge of the Williams

1. FRAUDULENT
CONVEYANCE:
INNOCENT
GRANTEES.

Burtis v. Humboldt County Bank.

indebtedness, and their purpose to defeat its collection, if such purpose existed. The consideration paid by the bank to Williams was not far from the real value of their leasehold interest, and, after the amount they were owing on the lands was paid (for it seems the lease was in effect a contract of purchase and sale), the property cost the bank about its full value,—at least there was not such an inadequacy of consideration as would raise a presumption of fraud.

III. Plaintiff insists that the evidence shows that the defendants held the lease and land under a trust for Williams' benefit. We fail to find support in the evidence for this position. The mere fact that Williams remained in possession of the lands for a time, without more, does not authorize the conclusion.

IV. It is insisted that the bank cannot hold the land for the reason that by the payment of a *bonus* it procured a deed before the time for its execution had arrived. Counsel's position is that, as the land is required to be sold on time in order to provide a fund for the college arising from the interest on the purchase price, the bank could not defeat the object of the law by paying the purchase money for the land before it was due. But we think the college could receive the principal when its interest would be promoted thereby; and we are required to presume that the officers of the college acted rightly, and for its interests, which were promoted by the *bonus* paid by the bank, or by other matters not appearing in the record. We reach the conclusion that the judgment of the district court ought to be

AFFIRMED.

2. AGRICULTURAL COLLEGE: lands of: sale for cash.

The State v. Blunt.

THE STATE V. BLUNT.

Assault With Intent to Rape: PUNISHMENT. For an assault with intent to rape, committed upon a child of tender years, but in no other respect an aggravated offense, the defendant was sentenced to fifteen years at hard labor in the penitentiary. *Held* not duly proportioned to the degree of the offense, and it is reduced to ten years.

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, FEBRUARY 1, 1889.

GRANGER, J.—The defendant was convicted of the crime of an assault with intent to commit a rape, and he appeals to this court. The cause has before been submitted here, and the submission set aside, at the instance of defendant, or those acting in his interest, in the hope that we might be favored with a brief and argument in his behalf. The submission at this term is at his written request, but without brief or argument for either party. We have given to the record a careful examination, as the law requires, and we discover nothing like reversible error. The charge of the court was eminently fair to the defendant, and the testimony unquestionably sustains the verdict. The statute penalty for such an offense is imprisonment in the penitentiary for a period not exceeding twenty years. The court has a wide range of discretion in imposing penalties for this offense, and the circumstances of each particular case must largely control the extent of the punishment. Barring the disgusting features of such an offense, even in its mildest form, and the circumstances of this case are not aggravating. It is true, the assault was upon a child of tender years, meriting, perhaps, a higher degree of punishment than if upon a person older, with the other

 Sperry, Watt & Garver v. Gallaher.

circumstances the same. In its facts it is but an ordinary case, and the punishment should be graded accordingly. The judgment of the district court is that the defendant be confined at hard labor in the penitentiary for a period of fifteen years. We think this disproportionate, and the judgment of the district court is so modified as to make the term of imprisonment ten years.

MODIFIED AND AFFIRMED.

SPERRY, WATT & GARVER v. GALLAHER.

Assignment for benefit of creditors: VOID BECAUSE CONDITIONAL.

An assignment for benefit of creditors contained the following clause: "In case that any of my creditors who file claims against my estate, and receive a dividend therefrom, do not receive the full amount due them, then the receipt of any just *pro rata* share of the amount due them shall be deemed a satisfaction of the demand, and so by them accepted." *Held*, that this clause made the assignment conditional, and therefore void, and that the court rightly so held in a garnishment proceeding against the assignee by a creditor who repudiated the assignment, and sought to reach the property in the hands of the assignee for the full satisfaction of his claim. (See cases cited in opinion.)

Appeal from Greene District Court.—HON. J. P. CONNER, Judge.

FILED, FEBRUARY 1, 1889.

On the twenty-second day of February, 1888, the plaintiffs commenced an action against one Speers upon an account for goods sold. An attachment was sued out, and J. A. Gallaher, the appellant, was garnished. Judgment was rendered against Speers, and the answer of appellant garnishee was taken in open court, and, on motion of the plaintiffs, judgment was rendered against him for the amount of the judgment and costs against against Speers. The garnishee appeals.

77	107
94	99
77	107
109	694
77	107
127	300

Timothy Brown, for appellant.

Lehman & Park, for appellees.

ROTHROCK, J.—It appeared by the answer of the garnishee that on the eighth day of February, 1888, Speers made a general assignment of his property to Gallaher, the garnishee, for the benefit of his creditors. In the examination of the garnishee the assignment was produced. It was claimed by the plaintiffs to be void upon its face, and, as it was conceded that the garnishee was in possession of a large amount of the property of Speers, which he held by virtue of the assignment, it was claimed that judgment should be rendered against the garnishee. The court sustained the claim made by the plaintiffs, and rendered judgment accordingly.

The assignment was general. It embraced all of the debtor's property, except such as was exempt from execution. It was duly acknowledged and recorded, and Gallaher, the assignee, accepted the trust, and was proceeding to carry it out, when he was garnished. The instrument, after providing for the sale of the property under the direction of the district court, and the collection of the assigned accounts and choses in action, made the following provision as to the payment of creditors: "To pay over to my creditors of my estate who have filed and proved their claims as provided by law, and under the direction of the court, a *pro rata* share to each, equal in amount due them, at the same rate per cent., if less than the full sum due to them or each of them. In case that any of my creditors who file claims against my estate, and receive a dividend therefrom, do not receive the full amount due them, then the receipt of any just *pro rata* share of the amount due them shall be deemed a satisfaction of the demand, and so by them accepted." This provision or condition in the assignment plainly requires the creditors who file claims to accept a *pro rata* share of the estate in full satisfaction of their demands. It seems to us it will

bear no other construction. Counsel for appellant contends that the receipt required is not to be in satisfaction of the whole debt, but only as against the assignee. In other words, it is claimed that the receipt in full satisfaction is only in full of the demand against the assignee. The construction contended for leaves out of view the fact that the receipt of a *pro rata* share would be in full of all demands against the assignee. He could not be required to pay out more than he received. If nothing more was intended than a discharge of the assignee, the last provision of the condition that the *pro rata* share of the amount due shall be deemed a satisfaction of the demand would have been wholly unnecessary. By the terms of the assignment the creditors were required, when they received their share of the proceeds of the property, to release or extinguish the balance of the claims against the debtor. This would enable every insolvent debtor to enact a bankrupt-law in his own behalf. That such an assignment is void on its face was held in *Williams v. Gartrell*, 4 G. Greene, 287. It is there held that such an assignment is not unconditional, and that the assent of creditors thereto cannot be presumed. The statute now in force, in reference to presuming the assent of creditors, is not essentially different from what it was when the cited case was determined. See sections 977, 978, Code, 1851, and sections 2115, 2116, Code, 1873. See, also, *Berry v. Hayden*, 7 Iowa, 473. And that such assignments have been held to be void by the courts of last resort in many of the states, see Burrill, Assignm., secs. 192, 193, 196, and authorities there cited.

It is claimed by the appellee that, as the assignee is under the control of the court, the distribution among the creditors may be made by order of the court, and the objectionable feature of the assignment may thus be avoided. But it is very questionable whether the court has the power to change the terms of an assignment. If the plaintiffs in this case had filed their claim, and accepted a *pro rata* share under the assignment, by the very terms of the instrument they would have accepted

Flower v. Cruikshank.

the amounts paid them in full satisfaction. It would have amounted to a composition by a debtor with his creditors. As the assignment was void on its face as to those creditors who repudiated it, we think it was competent for the court to so declare upon the answer of the garnishee, by which it clearly appeared that he held the property and estate of the insolvent by no legal right, as against creditors who did not assent to the assignment.

AFFIRMED.

77	110
136	660

77	110
138	485

FLOWER V. CRUIKSHANK *et al.*

1. **Evidence: BALANCE: CORROBORATION.** The testimony of the parties hereto, as to the conditions of the contract between them, being substantially *in equilibrio*, their subsequent conduct in reference to the subject-matter of it is considered, and found to corroborate the theory of defendants.
2. **Real Estate: TITLE NOT YET EARNED: EQUITABLE AID.** Plaintiff agreed with defendants, his daughter and her husband, that they should occupy and cultivate his farm during the lifetime of him and his wife, and give them such care and support as they might need, and that, in consideration thereof, the daughter should have an undivided one-half interest in the farm. *Held* that the daughter did not become the equitable owner of such half interest during the lifetime of her parents, because the conditions on her part were not yet fully performed, and that equity could not decree her to be the equitable owner of such interest.
3. **———: CONTRACT TO SUPPORT PARENTS FOR INTEREST IN: DISAFFIRMANCE: EQUITY.** In this case the evidence shows a contract to support parents in consideration of an interest in real estate. Plaintiff, one of the parents, and the owner of the land, did not claim a breach of the contract, nor a disaffirmance of it, but that no such contract had been made. *Held* that, whatever his right to disaffirm it might be, since he had not done so, and did not allege any breach of it on the part of defendants, it remained in full force, and equity could not disregard it and grant plaintiff a decree quieting his title in the land and giving him possession thereof, the defendants being entitled to such possession under the contract.

Flower v. Cruikshank,

Appeal from Humboldt District Court.—HON. LOT THOMAS, Judge.

FILED, FEBRUARY 1, 1889.

THE subject of this action is a farm of three hundred and twenty acres in Humboldt county. For many years prior to April, 1879, plaintiff had been the owner of said farm, and the legal title thereto is still vested in him. In 1876 defendants, who are the daughter and son-in-law of plaintiff, went into possession under a parol lease, and have remained in possession ever since. They claim, however, that in 1879 a new contract was entered into, by the terms of which they were to continue to cultivate the farm during the lifetime of plaintiff, who was then about seventy years old, and afford him and his family, which consisted of himself and wife, a support from the proceeds thereof, and care for them in case they should come to need assistance and care, and to apply any remainder of the proceeds, after paying the expenses of conducting it and supporting the two families, to the improvement of the farm, and that, in consideration of their services, plaintiff was to give defendant Esther F. an undivided one-half interest in the place; and they allege that since the making of that contract they have been in possession under it, and have faithfully performed all their undertakings under it. Plaintiff brought this action to quiet his title, and for possession. Defendants pleaded the alleged contract of 1879, and prayed that Esther F. be adjudged to be the equitable owner of an undivided one-half of the property. The district court entered judgment for plaintiff in accordance with the prayer of the petition; but the decree provides that the parties may, within a specified time, file such additional pleadings as may be necessary to effect an accounting between them. Defendants appeal.

Albert E. Clark and *A. D. Bicknell*, for appellants.

Wright & Farrell, for appellee.

REED, C. J.—I. The parties agree that a new arrangement with reference to the occupation and carrying on the farm was entered into in April, 1879, but they disagree as to the terms of the agreement. Plaintiff testified that the contract was entered into with defendant George L. Cruikshank, and that by its terms he transferred to Cruikshank an undivided one-half interest in the stock and personal property on the farm in consideration of the undertaking of the latter to assist him in paying certain indebtedness he was then owing, and that the farm was to be carried on by the parties jointly, the proceeds to be devoted to the payment of the taxes on the place, and the expense of carrying it on, and the remainder to be equally divided between them. He also testified that some months after the contract was entered into he promised that if defendants would remain on the farm during his lifetime and that of his wife, and would care for them in case they should come to require care and attention in their old age, he would give defendant Esther as her share of his estate an undivided one-half of the farm, while defendant George L. testified that the agreement entered into in April was substantially as alleged in the answer, and that the arrangement with reference to the personal property and the payment of the debts was subsequently entered into. On this question of fact we think the preponderance of the evidence is with the defendants. If the case depended on the direct testimony of the two witnesses, who alone have personal knowledge of the transaction, it could hardly be said that either claim was established; for, while they appear to be equally candid and credible, there is a direct and positive conflict in their testimony. We think, however, that defendant is corroborated by the action and conduct of the parties subsequent to the making of the contract. There never has been any division of the proceeds of the farm, or any accounting

1. EVIDENCE:
balance:
corrobor-
ation.

between the parties with reference to it. Defendant has carried on the farm, employed and paid the help, disposed of the produce, and applied the proceeds in payment of the expenses and for the support of his family, giving to plaintiff, from time to time, such amounts as he required for his own use. He has also devoted to the same use means of his own not derived from the farm, amounting in the aggregate to a considerable sum. He has also expended nearly one thousand dollars in permanent improvements on the farm, the amount being derived from the sale of the produce and stock from the place. No account of the receipts and expenditures has ever been kept by either of the parties; nor did plaintiff at any time make any objection to the manner in which the business was being conducted, or any demand for a different application of the proceeds. These facts are strongly corroborative of defendants' claim. They are also quite inconsistent with that asserted by plaintiff, and, when considered in connection with the direct testimony, they lead us to the conclusion that the contract was as claimed by defendants.

II. It does not follow from our finding of fact, however, that defendants are entitled to the affirmative relief demanded in their answer. The contract was executory in all of its provisions. Defendants were to render the services contracted for during the lifetime of plaintiff and his wife. As part compensation for the services, defendant Esther F. was to receive an undivided one-half of their farm. She did not become the equitable owner of that interest upon the making of the contract, but will be entitled to receive that interest only when she and her husband shall have performed their undertakings under it. The only present right of defendants in the farm under the contract is the right to occupy and cultivate it according to the terms of the agreement. But the ownership of the property has not yet accrued to them.

III. It was contended that the agreement, from its nature, being for personal services and care, is necessarily

8. —: contract to support parents for interest in : disaffirmance: equity. determinable at the election of either of the parties, and that upon its determination the remedy of the one aggrieved is in an action for damages. It is probably true that while the contract remained executory a court of equity would not decree specific performance. A court could not enforce an undertaking to render personal service or care to another. Nor could it compel the other party to such a contract to receive the attention or service of another against his will. For a breach of an undertaking of that kind the parties would be left to their remedy at law. But the contract was valid. It had a lawful object, and was certain and definite in its terms; and, when fully performed, a court of equity would enforce the rights of the parties under it. *Franklin v. Tuckerman*, 68 Iowa, 572. There is no question in the case as to a breach or termination of the contract. Plaintiff's contention is that no such contract ever was entered into; not that there has been a breach by defendants, or that he has terminated it. Upon that state of facts it is clear that a court of equity will not grant him the relief demanded. We do not determine whether he has the right to terminate the contract or not; but, if that right should be conceded to him, he could exercise it only upon payment or by offering to pay the damages which defendants would sustain in consequence of such termination. But he has neither paid nor offered to compensate defendants for the services they have rendered under the contract, nor does he allege that the compensation which they have received in the enjoyment of the property is adequate compensation to them. The contract, therefore, remains in full force, and the courts cannot award the measure of relief which would be due him only in case of its termination, which is the measure of relief demanded. The judgment will therefore be reversed, and judgment will be entered in this or the district court, as the parties may elect, dismissing the petition.

REVERSED.

77	115
81	453
77	115
91	288

DEERE & CO. v. WOLF *et al.*

1. **Fraud: IN CONVEYING CHATTELS: EVIDENCE.** Intervenor (a bank) claimed to own certain chattels attached by plaintiff as the property of defendant, alleging that defendant had conveyed the chattels to it in payment of his debt to it. *Held* that it was proper for plaintiff to demand a full disclosure of all the transactions between defendant and intervenor, in order that it might be determined whether there was an actual payment of intervenor's claim, and the purpose with which it was paid; and that answers of intervenor's president, which tended to throw some light on these matters, were properly admitted.
2. **The Same.** In such case it was proper to determine just what interest the bank had in the property, and to that end evidence of statements made by the president of the bank, after the alleged transfer of the property to it, to the effect that the property was held as security, was properly admitted.
3. **The Same.** In such case it was proper to show that the president of the bank had advised a creditor of defendant to garnish the bank, as this tended to show that the bank did not purchase the property.
4. **The Same.** In such case it was also proper to admit evidence tending to show the amount realized from the sale of the property, as tending to show its value, which might have some bearing on the good faith of the transaction.
5. **Instructions: ERROR IN FAVOR OF APPELLANT.** An appellant cannot be heard to complain of an erroneous instruction when the error is in his own favor.
6. **——: MUST BE CONSIDERED TOGETHER.** All the rules of law upon a subject material to a cause need not be given in one instruction. It is sufficient if they are fully and clearly given in the whole charge.
7. **——: NOT ASKED FOR BY APPELLANT.** An appellant cannot be heard to complain of the failure of the court to give in an instruction a rule of law not asked for by him, when the rule does not seem necessary for a correct determination of the case.
8. **——: FRAUD: CONSPIRACY: PLEADING.** Where the answer to a petition of intervention, claiming attached property on the ground of a prior purchase, alleged that the purchase was void on account of the fraudulent purpose of all the parties participating therein, *held* that this was a plea of fraud, and not of conspiracy, and that an instruction taking all question of conspiracy from the jury, on account of the want of evidence, did not take away the issue of fraud, and render erroneous further instructions on that issue.

9. **Verdict: EVIDENCE TO SUPPORT.** Where the evidence is conflicting this court will not set aside a verdict as being unsupported by the evidence.
10. **Appeal: ERROR IN APPELLANT'S FAVOR.** An appellant cannot predicate error on the fact that the judgment from which he appeals is less than the verdict of the jury against him.

Appeal from Adams District Court.—HON. R. C. HENRY, Judge.

FILED, FEBRUARY 1, 1889.

ACTION by attachment. The intervenor (a bank) claims certain goods attached. The issues arising upon this claim are involved in this appeal. The cause was tried to a jury, and a judgment had for plaintiffs. The intervenor appeals. The case has before been in this court. See 65 Iowa, 32.

C. S. Keenan and J. W. McDill, for appellant.

James McCabe and Smith McPherson, for appellee.

BECK, J.—The cause may be more conveniently disposed of by considering the objections to the judgment as nearly as possible in the order of their discussion by the counsel of intervenor.

I. The intervenor claims to be the absolute and unqualified owner of certain personal property which plaintiff caused to be seized upon an attachment in this case. This claim of ownership is based upon a transfer by the defendant to the intervenor of property of considerable value, in payment of an indebtedness from defendant to the intervenor. Plaintiffs claim that this transfer is void, for the reason that it was made in pursuance of a contract to “stifle, hinder and prevent a prosecution against defendant for the crime of forgery,” and for the further reason that it was made with the intention of defendant, and all persons participating therein, to hinder, delay and defraud the creditors of the defendant, among whom were plaintiffs. The intervenor claims to have purchased the personal property of defendant Wolf in payment and satisfaction of all claims held by it against him.

II. The president of the intervenor was examined as a witness, and testified to the transactions of the bank in connection with the claim it held against Wolf, and the transfer of property in payment therefor. His statement is not clear, and need not be repeated. He states, among other things, that in the transaction he issued a certificate of deposit for five thousand dollars, which, as he says, was given to represent the difference of certain accounts. Thereupon he was asked this question: "How did you make your deposit account balance?" His answer is in these words: "I cannot explain to you the book-keeping. That balances itself. If you take off five thousand dollars bills receivable, and write a certificate of deposit for five thousand dollars, that balances." Counsel now insist that the evidence was erroneously admitted. The issue involved the good faith of the alleged payments made by defendant, and whether the transaction was, on the part of the intervenor, with the purpose of delaying and defeating creditors. It was proper for the plaintiff to demand a full disclosure of all the transactions, to the end that it might be determined whether they were honest and fair, whether there was an actual payment of the intervenor's claim, and the purpose with which it was paid. It appears to us the answer tended to throw some light upon these matters. The evidence was therefore rightly admitted.

III. Certain conversations were had by a witness with the president of the bank after the alleged transfer of the property, in which he, in effect, stated that the property was held as security. To this evidence objections were made. We think they were rightly overruled. It was proper to determine just what interest the bank claimed to have in the property. This statement of its chief officer, who was authorized to speak for the bank, is competent as tending to show that interest.

IV. A witness testified that an attorney, who had taken a mortgage to secure another bank, testified that he had no authority to do so. The evidence was

objected to on the ground of irrelevancy and immateriality. The attorney had before testified in this case, upon his cross-examination, that he had not testified as stated. The evidence was properly received to contradict and discredit his testimony, if it was competent for no other purpose. Objection is made to a question asked another witness, but the abstract fails to show that the question was answered. No error is therefore shown.

V. Other testimony as to the statements of the president of the intervenor, advising a creditor of the defendant to garnish the bank, was
 3. THE SAME. admissible, on the ground that it tended to show that the intervenor did not purchase the property.

VI. Evidence was admitted, against the intervenor's objection, tending to show the amount realized from the sale of the property. This
 4. THE SAME. evidence tended to show the value of the property, which might have some bearing in determining the *bona fides* of the transaction.

VII. The court, in an instruction, directed the jury that, before they could find the sale fraudulent, it should be made to appear that the price
 5. INSTRUCTION :
 error in favor
 of appellant. paid by the intervenor was in excess of the real value of the property. This instruction is now complained of. It was doubtless given through mistake, into which the court may have been led by an instruction asked by the intervenor conveying the same thought. But the error of the instruction is plainly to the advantage of the intervenor. He cannot, therefore, complain of it.

VIII. Objections are made to one or more of the instructions on the ground that there was no evidence to which they are applicable. We think the objections not well taken. One of these instructions was to the effect that, if the intervenor held possession of the property as agent of defendant, he cannot defeat the attachment. An inference may be drawn from the declarations of the president of the bank that a garnishment process would avail a creditor, and that the bank did not hold the property claiming it as an owner, but

rather as an agent. The question whether the property was held by the bank as an owner or bailee is raised by the pleadings.

IX. An instruction (the eleventh) directed the jury, among other things, that an intention, by withdrawing property from the reach of creditors, to defeat the recovery of their debts, is fraudulent. Counsel for the intervenor complain that the instruction does not present the rules allowing a vigilant creditor to take property in payment or security of his debt; but these rules are sufficiently presented in succeeding instructions. It cannot be expected that all the rules upon a subject can be given in one instruction.

X. Objections to another instruction (the fourteenth) are based upon the ground that it fails to present the rule that the bank cannot be bound by the acts or knowledge of its agents, unless done and obtained while acting within the scope of their authority. We think it was not necessary, for the correct determination of the case, to present this rule to the jury. If the intervenor's counsel so thought, they should have asked for an instruction presenting the rule. As they failed to do this, they cannot now complain.

XI. A paragraph of the answer of plaintiff to the intervenor's petition alleges that "the purchase of the property is void, as to plaintiff, for the reason that the same was made with the intent of Wolf and the intervenor, and all parties participating therein, thereby to hinder, delay and defraud the then existing creditors of Wolf, of whom plaintiff was at that time one."

XII. The court, in an instruction, informed the jury that, as there was no evidence of a conspiracy, the questions relating thereto were withdrawn from their consideration. Counsel now insist that after the last instruction no issue of fraud remained for the determination of the jury, and therefore instructions relating to that issue were erroneously given. But it will be

6. —: must be considered together.

7. —: not asked for by appellant.

8. —: fraud: conspiracy: pleading.

observed that plaintiff's answer, above quoted, does plead fraud. It cannot be understood as alleging a conspiracy, but rather a fraudulent purpose on the part of all persons participating in the purchase. The issue as to the fraud remained in the pleading.

XIII. Counsel for the intervenor complain of alleged misbehavior of counsel for plaintiff in his statement of the case to the jury, in that incorrect statements and claims as to the facts of the case were made by him. We think the objection is not well taken. It is probable that counsel failed to state accurately the facts of the case, and was free in his inferences drawn from the facts; but we think he did not so far transgress in this regard as to require the reversal of the judgment.

XIV. It is urged that the general verdict and special findings are not supported by the evidence. It is a case of the conflict of evidence, and the familiar rules recognized by this court applicable thereto will not permit us to disturb the judgment on this ground.

9. VERDICT:
evidence to
support.

XV. The court rendered a judgment for about thirty-one dollars less than the amount of the verdict, which is now made a ground of complaint.

10. APPEAL:
error in ap-
pellant's
favor.

But surely this is an error, if it be an error, of which the intervenor cannot complain.

The judgment is a charge on the property claimed by intervenor, and, as it is less than the sum for which it could or should have been rendered, it is not an error of which the intervenor can complain.

We have considered all questions discussed by counsel, and reach the conclusion that the judgment of the district court ought to be

AFFIRMED.

KAVALIER *et al.* v. MACHULA *et al.*

1. **Appeal: TRIAL DE NOVO: TRANSLATION OF EVIDENCE FILED TOO LATE.** Section 2742 of the Code requires the translation of the short-hand reporter's notes of evidence in an equity case not only to be certified by the trial judge, but also to be filed in the office of the clerk of the trial court, within the time allowed for taking an appeal, in order to entitle appellant to a trial *de novo* in this court. (*Arts v. Culbertson*, 73 Iowa, 14, *followed*, and *Runge v. Hahn*, 75 Iowa, 733, *distinguished*.)
2. **Pleading: COUNTER-CLAIM: WHAT IS NOT.** It is the opinion of this court that the affirmative matter pleaded in the answer in this case (see opinion) was designed to show a defense to plaintiffs' claims rather than to lay the foundation for affirmative relief, and that the case was tried in the district court on that theory, and that a decree in favor of the defendants on the allegations of the petition would have given them all the relief they could have obtained on the averments of their answer. It is therefore *held* that they were not entitled to affirmative relief on their answer, on the ground that it amounted to a counter-claim, and that no reply was filed thereto.
3. **Parties: MINORITY: PRESUMPTION AGAINST.** In the absence of any averments in the pleadings, and of any competent proofs in the record, that one of the defendants is a minor, this court must presume that she is of age, and competent to make her own defense.

Appeal from Tama District Court.—HON. JOHN L. STEVENS, Judge.

FILED, FEBRUARY 1, 1889.

THIS is an action in equity, brought for the cancellation of an agreement in regard to real estate, to quiet title, and for an accounting. A decree was rendered in favor of the plaintiffs. Defendants appeal.

Rickel & Crocker, for appellants.

Caldwell & Drahos and *Struble & Stiger*, for appellees.

77	121
77	127
77	121
78	229
77	121
82	708
82	731
77	121
85	252
85	741
77	121
87	78
77	121
91	481
77	121
93	681
77	121
95	70
77	121
104	57
105	142
77	121
113	614
77	121
115	724

ROBINSON, J.—The petition alleges that in the year 1867 the plaintiff, Joseph Kavalier, purchased the one hundred and twenty acres of land therein described; that he paid down one-fourth of the purchase price, and gave his note for the remainder; that thereafter the plaintiffs, who were then, and are now, husband and wife, improved said land, erected thereon a dwelling-house, and made it their homestead; that, while it was their homestead, the plaintiff, Joseph Kavalier, alone, made an oral agreement with his son Joseph, whereby the latter was to become the owner of the land, upon condition that he should improve all of it not then improved, and pay the unpaid portion of the purchase price, and deliver to his father one-fourth of all crops raised thereon during the lifetime of the father, and also allow him to retain thereon two cows, and occupy two rooms in the house; and that, in case the wife of the father should survive him, she was to succeed to his right to a share of the crops and other privileges named. The petition further states that in 1875 the son died, and left surviving him the defendant Kate—who afterwards married her co-defendant, John Machula—and two children, of whom defendant Julia only is now living; that since the death of the son Joseph the covenants to be kept by him have not been performed by any one; that defendants have abandoned the premises; that the son failed to pay the balance of the purchase price, and that the same was paid by his father; that in the fall of 1875 the father brought suit against the administrator of the estate of his son, the defendant Kate, and her children, to recover the portion of the purchase price which the son had neglected to pay, and for a specific performance of the oral agreement with the son; that in said suit the father recovered judgment for said portions of the purchase price, with interest, and obtained a decree for specific performance of said agreement; that the premises were sold to satisfy the judgment, and that redemption was afterwards made from said sale by the payment to the proper clerk of \$521.50, which still

Kavalier v. Machula.

remains in his hands; that, notwithstanding the facts aforesaid, defendants have neglected and refused to perform said agreement, and comply with the decree of court. The plaintiffs tender to defendants so much of the redemption money in the hands of the clerk as they shall be found entitled to receive, and ask that the oral agreement between the father and son be annulled; that plaintiff, Joseph Kavalier, be decreed to be the owner of the premises in fee simple; and that his title be quieted as against defendants, and that an accounting be had, and that general equitable relief be given. The answer denies that the plaintiff Joseph, purchased the land, and alleges that it was purchased by Joseph, the son, and denies most of the allegations of the petition. In a portion of the answer entitled "Second Division," the defendants set out substantially the oral agreement pleaded by plaintiff, and allege that after the death of Joseph, Jr., the plaintiff Joseph and defendant Kate, with the knowledge and consent of the wife of the father, entered into an agreement in writing, whereby defendant Kate was to succeed to the rights and obligations of her deceased husband, under the said oral agreement; that under said written agreement defendant Kate remained upon said premises, and performed her obligations thereunder, until April, 1876, when she was driven away by plaintiffs, and prevented from fulfilling on her part the conditions of her said agreement. The defendants ask that this agreement be established; that the land be declared to be the property of defendants Kate and Julia at the death of plaintiffs; and for general equitable relief. By an amendment to their answer defendants allege that, ever since the entry of the judgment and decree referred to in the petition, plaintiffs have occupied the premises in controversy, and enjoyed all the rents and profits arising therefrom, amounting, in the aggregate, to much more in value than one-fourth of the crops which might have been raised thereon; that after the decree was rendered, and the premises were sold, defendants redeemed from the sale; and that plaintiffs are now estopped from claiming a forfeiture,

or asking a rescission of the agreement. The court found plaintiffs entitled to the special relief demanded, and rendered a decree accordingly, and awarded to defendants the redemption money in the hands of the clerk.

I. The abstract of appellants, and the additional abstract of appellees, show that the case was submitted on the twenty-eighth day of October, 1887, and by consent taken under advisement by the court, to be decided in vacation; that the decree was made of record on the eighth day of February, 1888; that the short-hand reporter's notes of the trial were filed in the proper office on the twenty-eighth day of October, 1887, but were not certified by the short-hand reporter, nor by the judge before whom the cause was tried; that the translation of the short-hand reporter's notes was certified by the judge on the twenty-first day of May, 1888, but was not filed in the office of the clerk of the court until the twenty-first day of August, 1888. No errors have been assigned by appellant, and this case is only triable by this court *de novo*, if it can be here tried. Appellees object to a consideration of the evidence on the ground that it was not made a part of the record, as required by law. Section 2742 of the Code requires that in equitable actions, wherein issue of fact is joined, all the evidence offered in the trial "shall be certified by the judge at any time within the time allowed for the appeal of said cause, and be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew." It has been held that this provision requires that the translation of the short-hand reporter's notes be filed within six months from the rendition of the decree. *Arts v. Culbertson*, 73 Iowa, 14. Appellants contend that the time of filing is immaterial. It is true that some of the language used in the opinion in *Runge v. Hahn*, 75 Iowa, 733, relied upon by appellants, considered apart from the facts in that case, seems to sustain their position. But it will be observed that the time of filing the certified translation of the short-hand

1. APPEAL: trial
de novo:
translation of
evidence filed
too late.

Kavalier v. Machula.

reporter's notes was not involved in that case, nor was it considered by the court. The question decided was the sufficiency of the judge's certificate to identify the evidence offered, and it was said to be the object of the statute to secure the identification of the items of evidence offered by the trial judge. No purpose to overrule any decision of this court was indicated. The provisions of section 2742, quoted, that the evidence offered "shall be certified by the judge, * * * and be made a part of the record," shows clearly that the certification of itself does not make the evidence a part of the record. It is well known that in ordinary practice the person who desires to use the translation procures it and presents it to the judge for certification. When certified, it is usually returned to the person who presented it, and in that case remains his property until he files it in the proper office. Until it is so filed, no one but himself has any right to possess or control it. Should he decide to withhold it from the record, no one would have any just ground for complaint. Of course, what we have said in regard to this does not apply to documents or other property which belong to another person, or which have become so far a part of the record that they cannot be withdrawn without an order of the court. We conclude that the translation and certificate in question were not filed within the time required by statute, and that the evidence which it was intended to identify thereby must be disregarded.

II. No reply to the answer was filed. It is contended by appellants that their answer contains a counter-claim, and that they are entitled to judgment thereon by reason of the failure of plaintiffs to plead thereto. We are satisfied that the answer was not drawn, and that the case was not tried in the district court, upon that theory. The affirmative matter pleaded in the answer was designed to show a defense to plaintiff's claims, rather than to lay the foundation for affirmative relief. A decree in favor of defendants, on the allegations of the petition, would have given them all the relief which they could have

2. PLEADING:
counter-
claim: what
is not.

Thomas v. McDaneld.

obtained on the averments of their answer. *Walker v. Sioux City and I. F. Town Lot and Land Co.*, 66 Iowa 752. Therefore, they are not entitled to any relief on the pleadings.

III. Appellants insist that no relief should be granted as against defendant Julia Kavalier, for the alleged reason that she is a minor, and has not made defense by guardian. We have examined the record, but fail to discover any averments in the pleadings or competent proofs in the record that she is a minor. We must therefore presume, for the purposes of this case, that she is of age and competent to make her own defense. The decree of the district court is

AFFIRMED.

THOMAS V. MCDANELED *et al.*

1. **Appeal: DENIAL OF ABSTRACT SERVED TOO LATE: CONSEQUENCES.** It is not the practice of this court to disregard an additional abstract because filed after the time fixed by section 19 of the rules of practice, though a case might arise in which such action would be justified. (Compare *Fowler v. Town of Strawberry Hill*, 74 Iowa, 645.) In this case, held that a denial of appellant's abstract, though served after the designated time, should be considered, since the final submission of the case does not seem to have been retarded by the delay.
2. ———: TRIAL DE NOVO: TRANSLATION OF EVIDENCE FILED TOO LATE. The translation of the short-hand reporter's notes of the evidence in this case not having been filed in the office of the clerk of the trial court within the time allowed for taking an appeal, such evidence cannot be considered here, and a trial *de novo* cannot, therefore, be had. (See first head-note to last preceding case.)

Appeal from Linn District Court. — HON. J. H. PRESTON, Judge.

FILED, FEBRUARY 2, 1889.

ACTION to set aside certain mortgages, and to subject real estate to the payment of a judgment. After the hearing in the district court judgment was rendered dismissing the petition of plaintiff, and awarding to defendants costs. Plaintiff appeals.

77	126
78	695
77	126
90	299
77	126
91	481
77	126
93	681

 Thomas v. McDaneld.

Rickel & Crocker, for appellant.

Davis & Voris, for appellees.

ROBINSON, J.—I. The abstract of appellant was served on the eighth day of September, 1888. On the fifth day of the next month the appellees served a denial of the correctness of appellant's abstract. Appellant objects to this denial on the ground that it was not served within ten days from the time when counsel for appellees received the abstract, as required by section 19 of the rules of practice of this court. It is not our practice to disregard an additional abstract filed after the time fixed by the rule, although a case might arise in which we would be justified in doing so. See *Fowler v. Town of Strawberry Hill*, 74 Iowa, 645. All the relief to which appellant is entitled in such cases can usually be given by taxing costs against appellee, or imposing other terms upon him. In this case the final submission in this court does not seem to have been retarded by the delay in serving the additional abstract, and it must be considered on its merits.

II. The appellees deny that the evidence was made a part of the record, as required by law. It appears that the decree from which the appeal is taken was rendered on the sixteenth day of November, 1887, and that the evidence was certified by the trial judge on the fourteenth day of April, 1888. But it also appears that the translation of the short-hand reporter's notes, to which the certificate of the judge was attached, was not filed nor deposited for filing in the office of the clerk of the district court until the second day of October, 1888. It was not, therefore, filed within the time required by law, and must be disregarded. *Kavalier v. Machula*, ante, p. 121. Since this is an equitable action, and no errors are assigned, we cannot review the judgment of the district court. It is therefore.

AFFIRMED.

BLECKMAN V. BUTLER *et al.*

77	128
122	688
•123	280

Judicial Sales: PAYMENT OR PURCHASE OF CERTIFICATES: REDEMPTION BY JUNIOR LIEN-HOLDER. E., who was plaintiff's son, was the owner of the four acres of land in controversy. The land was sold successively on several judgments against the son, one of which was also against the mother (plaintiff) as surety. The mother made a arrangement with defendant B., whereby he was to acquire the certificates of purchase and extend to her the time for redemption. L. afterwards purchased the land upon execution on a judgment inferior to those above referred to, and he claimed to hold it as against plaintiff, on the ground that plaintiff's arrangement with B. amounted to a payment and extinguishment by her of the prior liens, thus making his lien the first one. But *held* that his claim could not be sustained, for two reasons: *First*, because plaintiff, as a surety, had the right to redeem, and thus to acquire the judgment for which she was surety, and hold it for her own protection, and by doing so she did not pay and extinguish it; *second*, L.'s effort to redeem was not made within the time prescribed by the statute.

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, FEBRUARY 2, 1889.

ACTION in chancery to enforce the right of plaintiff to redeem from certain execution sales of real estate; the certificates of purchase having been acquired and being held by defendant Butler under an agreement with plaintiff whereby the right to redeem was extended and secured. Littleton was made a defendant, and filed a cross-petition, setting up his claim and interest in certain lands involved in the controversy, and asking that his title therein be quieted. The relief prayed for by plaintiff as against Butler and other defendants was granted, and the cause was continued as to Littleton's cross-petition, on trial of which the relief prayed for therein was granted by a decree. Plaintiff appeals from the decree upon Littleton's cross-petition.

Reed & Reed, for appellant.

Mitchell & Dudley and *Baylies & Baylies*, for appellees.

BECK, J.—I. The facts in the case, which are rather intricate, are as follows: The plaintiff, at one time, was the owner of all the lands involved in the different parts of the action. She conveyed four acres of the land which is involved in Littleton's part of this action to her son Emil. Cassady recovered judgment against plaintiff and Emil, and subsequently Emil conveyed the four acres to the Empire Coal Company. Prior to this judgment and conveyance, Emil mortgaged the four acres to Tovey, who assigned to Brown. The four acres, and thirty acres of land owned by plaintiff, were sold on Cassady's judgment. All the lands were sold upon a decree of foreclosure in favor of the Northwestern Mutual Life Insurance Company. The Tovey mortgage was foreclosed, and the four acres, as well as the coal-mining lease, covering thirty acres, by plaintiff to Emil, were sold upon the decree. The purchaser redeemed from the sale on the Cassady judgment. Thereupon plaintiff and Butler entered into a contract under which Butler was to acquire the certificate of sale, and extend the time of redemption to plaintiff. Butler also acquired one or two liens on the property, but no further reference need be made thereto. Littleton recovered judgment against the Empire Coal Company, the owner of the four-acre tract in controversy, and subsequently caused execution to be issued, and that lot to be sold upon the judgment.

II. It will be observed that Littleton's judgment was inferior to the mortgages and Cassady's judgment. Littleton claims the right to hold the land on the sale on his judgment, upon the ground that the redemption made by plaintiff as to the decree of foreclosure of the mortgages, and as to the judgment, was, in fact, payment, or operated as such, and they cannot, therefore,

Ver Straeten v. Lewis.

be enforced against the property. In our opinion, the evidence fails to establish payment of these encumbrances, but, on the contrary, it is clearly shown that the transaction on the part of plaintiff was for the purpose of redeeming from them, and not to pay them off. It was not the purpose of any of the parties to pay off and satisfy the judgment, but it was clearly their expressed intention that Butler should acquire the certificates of sale and liens. The debts for which the judgments were rendered were not the debts of the plaintiff as principal. While she was a party to one of the judgments she was such as surety for her son. This relation would authorize her to acquire the judgment, and to retain it unsatisfied, for her own protection. The relation as mother prompted her to aid the son, and in doing this she could acquire the judgment; and the payment for that purpose would not satisfy and discharge it.

III. Another consideration leads to the same conclusion. Littleton's right, under the statute, to redeem from the sales, had expired before he sought in this action to enforce it. Butler, therefore, acquired an absolute right, as against him, to a deed. This right, by the contract, passed to plaintiff. Littleton had no right to redeem from the sale. He cannot, therefore, defeat plaintiff's superior right to the land. It is our conclusion that the decree of the district court ought to be

REVERSED.

VER STRAETEN V. LEWIS, Judge.

1. **Intoxicating Liquors: INJUNCTION: DESIGNATION OF PROPERTY: CONTEMPT.** A writ enjoining a party from unlawfully selling intoxicating liquors on "part of lot number two, in the northeast quarter of the northwest quarter of section twenty-three," etc., is not void for uncertainty, as the mandate would be violated, and the offender made liable to punishment for contempt, by doing the forbidden acts on any part of the lot.

[GRANGER and ROBINSON, JJ., *dissenting*.]

 Ver Straeten v. Lewis.

2. ———: ———: CONTEMPT: EVIDENCE AS TO PLACE OF OFFENSE. In a proceeding for contempt in violating an injunction against the maintenance of a liquor nuisance on "part of lot number two," a witness who testified to the doing of the forbidden acts by the enjoined party was unable to testify from his personal knowledge that the building in which the forbidden acts were done was situated on lot number two; but he testified that he had examined a plat of the town in which the property was situated, and that he was able to say from that examination, and his knowledge of the location and surroundings, that the building was situated on that lot. *Held* that this evidence was not only not incompetent, but that it satisfactorily established the fact of the violation of the injunction.

Certiorari to Poweshiek District Court.—HON. W. R. LEWIS, Judge.

FILED, FEBRUARY 2, 1889.

PLAINTIFF was accused of contempt in disregarding an injunction. On a hearing before the district court of Poweshiek county, he was found guilty and sentenced to pay a fine, and to be imprisoned in the county jail. He then sued out a writ of *certiorari* from this court, which was served on the judge, who for return to the writ has certified the record of the proceedings to us.

Scott & Clute, for plaintiff.

A. J. Baker, Attorney General, for defendant,

REED, C. J.—I. The writ enjoined plaintiff from unlawfully selling any intoxicating liquors, including ale, wine and beer, and from keeping, or being concerned in keeping, the same for sale, contrary to law, either by himself, or agents, clerks, porters or lessees, upon the following described real estate, situated and lying in Poweshiek county, Iowa, to-wit: "Part of lot number two, in the northeast quarter of the northwest quarter of section twenty-three, township number eighty north, of range number fourteen west, until otherwise ordered by the court." It was contended that the writ was void for uncertainty. That a writ or order for the abatement

1. INTOXICATING
liquors: in-
junction: des-
ignation of
property:
contempt.

Ver Straeten v. Lewis.

of a nuisance which contained no more definite description of the property intended to be affected than that in the writ in question would be void, may be true. In that case, it would not be possible for the officer charged with the duty of executing the writ to determine from its recitals the particular building or place intended. But in this case the principal office of the writ was to prohibit the doing of certain specified acts. In that respect there is no uncertainty in its recitals. Any person, on reading the writ, would understand just what acts were forbidden by it. It prohibits the doing of the acts on "part of lot two," etc., and the mandate would be violated by doing them on any part of that lot.

II. The evidence, without conflict, shows that plaintiff continued to sell intoxicating liquors after the writ was served. It also shows that he car-

2. —:—:—:
contempt: ev-
idence as to
place of of-
fense.

ried on the business in the building used by him for that purpose when the injunction proceeding was instituted. No witness, however, was able to testify from his personal knowledge that the building was situated on lot two. But one witness did testify that he had examined a plat of the town in which the property is situated, and that he was able to say from that examination, and his knowledge of the location and the surroundings, that it is situated on the tract described in the writ. It was contended that the evidence of that witness as to the identity of the property is incompetent, being in the nature of mere hearsay. But evidence relating to the description of real estate is nearly always of that character, and necessarily so. The primary evidence of the subdivision of land, as a general rule, is found in the record of the surveys. But it is common practice in the courts to admit parol evidence as to the location and description of particular tracts. The manner of numbering the sections of land in a township, and their subdivisions, are matters of common knowledge in this country, where all the lands are included in regular surveys; and it is perfectly competent in some cases to prove the location of a building or other place, with reference to the subdivisions, by parol,

Ver Straeten v. Lewis.

whether the witnesses, by whose testimony it is proven, have any actual knowledge of the surveys or not. The evidence in question is of that character. The witness went to the common source of information as to the subdivision, viz., the plat or map of the locality, and from his examination, and his general acquaintance with the locality, was able to testify that the building occupied by the plaintiff was on the particular tract described in the writ. His testimony was not only competent, but it satisfactorily establishes the fact in question. We do not find, upon an examination of the record, that the district court acted illegally, or in excess of its jurisdiction, in rendering judgment against plaintiff, and this proceeding will accordingly be

DISMISSED.

GRANGER, J. (*dissenting*).—I do not concur in the conclusion announced by the majority opinion, that the writ is not void for uncertainty. Under the recitals of the writ, the defendant in the injunction proceeding was enjoined from selling, etc., on “part of lot two.” The majority opinion holds that the writ would be violated by selling on any part of the lot. To so hold is by force of construction to make a part include the whole. This we are not authorized to do. It is a rule having the force of mathematical certainty that “a part is not equal to the whole.” I think it plain, from the language of the writ, that it was not the intention to include in its operation all of the lot, which the record shows to embrace about twenty-eight acres, but only a part, and that part the court failed to designate. Such orders should be specific and certain, to justify the imposition of heavy penalties for violation. The writ itself should indicate to the party enjoined its very purpose, and then, if violated, the court should without hesitation impose the legal punishments. The majority opinion concedes that an officer with a writ of abatement for a nuisance, with the recitals so indefinite, could not execute it, because he could not determine the building or place intended. I think it just as indefinite as to the

Ver Straeten v. Lewis.

person required to observe the writ; he cannot determine the building or place intended. It is said that in this case the principal office of the writ was to prohibit the doing of certain specified acts, and that in that respect there was no uncertainty. That is true, but the writ went further, and fixed the restraint as to part of a lot; plainly indicating thereby that it did not mean the whole. The writ is exactly as plain a guide for the officer as for the party restrained. It should be kept in mind that this is not a proceeding to punish for the sale of liquors in violation of the general statutes, but for selling in violation of the orders of the court, and no punishment can be imposed in such a proceeding, unless such orders have been violated. If this is the rule to be applied in this case, it must be applied in others, when the act charged as a contempt would not otherwise be an offense. Let us suppose that A. and B. are owners of distinct parts of lot two, and at B.'s instance A. is sought to be enjoined from cutting timber on B.'s part; and the writ, as in this case, commands him not to cut timber on part of said lot, and he afterwards cuts timber on his own, could the court, upon complaint, say he was restrained from cutting on any part, and adjudge him in contempt? If the restraint was actually as to the whole lot, he could be punished. But I do not think, in such a case, the court would so hold. The cases may differ as to sentiment, but they do not in principle. I think the writ too indefinite to be enforced, and that the plaintiff should be discharged.

ROBINSON, J., concurs in this conclusion.

THE STATE V. HOAGLAND.

1. **Pharmacist: UNLAWFUL SALES OF LIQUORS: VERDICT AGAINST EVIDENCE.** Defendant, a registered pharmacist, having a permit to sell intoxicating liquors for the actual necessities of medicine only, was found guilty of abusing his trust in selling such liquors when he had reason to believe they would be used as a beverage. But, upon examination of the evidence (see opinion), *held* that there was no evidence whatever to support the verdict, and that the judgment rendered thereon should be reversed.
2. **— — : — — : DEGREE OF PENALTY.** The provision of chapter 83, Laws of 1886, that nothing in that act contained shall shield the pharmacist who abuses his trust "from the utmost rigors of the law now or hereafter in force in relation to the sale of intoxicating liquors," does not require the court to impose the extreme penalty of one thousand dollars upon every pharmacist who unlawfully sells intoxicating liquors.

Appeal from Washington District Court.—HON. W. R. LEWIS, Judge.

FILED, FEBRUARY 4, 1889.

THE defendant and one W. H. Hoagland were jointly indicted on a charge of keeping and maintaining a nuisance by unlawful traffic in intoxicating liquors. They were jointly tried, and the defendant was alone found guilty. He appeals.

H. & W. Schofield, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—It is claimed that the verdict is not supported by the evidence. It appears from the record that the defendant is a registered pharmacist, and that on the sixteenth day of December, 1886, he obtained a permit from the board of supervisors of Washington county, authorizing him to sell intoxicating liquors for medicinal purposes only. He is a practicing physician,

and owner and proprietor of a drug-store at the town of Brighton. The indictment was found on the fifth day of May, 1887, and all the sales of liquor made by him, as shown by the evidence, were made while he held said permit to sell. The state introduced four witnesses, who all testified that they had bought intoxicating liquors of the defendant during the time named. Each of these witnesses testified in the most positive terms that the purchases they made were for the actual necessities of medicine, and that the liquor was used for that purpose, and was not drunk as a beverage. None of it appears to have been drunk at the defendant's place of business. The liquors sold consisted of whisky, gin and brandy, and were sold in small quantities, from four ounces to a pint, at each time. All of the witnesses testified that at the time of making the purchases they thought they needed the liquors for the purposes of medicine, and that they consulted the defendant as to their ailments, and the effect of liquor as a medicine in their cases. All of the sales were made by the defendant in person, or under his immediate direction. One of the witnesses testified that he made purchases from two to a half dozen times. The other witnesses stated that they made more purchases, but not twice on the same day, nor to exceed two or three times a week, and not running through any great length of time. Two of the witnesses were blacksmiths. They both complain of kidney trouble; and one of them, in addition to this disease, complained of neuralgia. They all signed the certificate required by law at each purchase.

The defendant testified as a witness in his own behalf, and he stated that he made all the sales in good faith, after consultation with the purchasers as to their physical condition, and in the honest belief that the purchases were made for the actual necessities of medicine. There was no evidence of any excessive shipments of liquor to the defendant during the time named, and no other fact in the record from which any inference can be drawn that the sales were not made in strict accordance with the law.

Seska v. The Chicago, M. & St. P. Ry. Co.

The penalty inflicted upon the defendant was a fine of one thousand dollars. It is said in argument that the extreme penalty of the law was visited upon the defendant, because it is provided in chapter 83, of the Laws of 1886, that nothing in that act contained shall shield the druggist who abuses his trust "from the utmost rigors of the law now or hereafter in force in relation to the sale of intoxicating liquors." We do not believe that this provision of the statute requires the highest penalty to be fixed in such cases, and we do not think that there is any evidence in the case which authorizes a finding that the defendant had in any manner abused his trust. It is true, the law requires that a registered pharmacist shall refuse to sell intoxicating liquors "if he has reason to believe that the application is not made in good faith, and that the liquor would be used as a beverage."

The finding that the defendant had reason to believe that the applications to purchase were not made in good faith is contrary to every fact testified to by every witness in the case. It is equivalent to a finding that all the witnesses, for the state, as well as the defendant, were wilful and corrupt perjurers. Verdicts must be founded on facts, and not upon mere suspicion.

REVERSED.

SESKA V. THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.

77	137
90	151

1. **Railroads: NEGLIGENT FIRES: PLEADING.** A petition which alleged that the fire causing the injury complained of was set out by the defendant in the operation of its road stated a cause of action, without averments of negligence on defendant's part, for in such case negligence is presumed until the contrary is shown. (See cases cited in opinion.)
2. **———: ———: NEGLIGENCE: EVIDENCE.** In such case, the fact that the fire was set out in the operation of the road was *prima-facie* evidence of negligence, and whether this *prima-facie* evidence was overcome by the evidence of care exercised by defendant, was a question for the jury, with whose finding this court cannot interfere. (See cases cited in opinion.)

8. **Evidence : ERROR WITHOUT PREJUDICE.** The admission of irrelevant evidence is no ground for reversal where it appears that appellant was not prejudiced thereby.

Appeal from Story District Court.—HON. JOHN L. STEVENS, Judge.

FILED, FEBRUARY 4, 1889.

ACTION to recover for oats in the stack, and straw, stubble, pasture and fences owned by plaintiff, which were burned by a fire set out by an engine operated on defendant's road. There was a judgment on a verdict for plaintiff. Defendant appeals.

Struble & Stiger, for appellant.

Cole, Mc Vey & Clark and *G. A. Underwood*, for appellee.

BECK, J.—I. The petition does not allege that the fire was set out or caused by the negligence or want of care of defendant or its employes. A motion in arrest of judgment and for a new trial, on this ground, was overruled. This action is the first ground of complaint made by defendant. It is insisted that, in the absence of averment that the fire resulted from want of care or from negligence, the petition shows no ground for recovery. But the petition alleges that the fire causing the injury was set out by defendant in operating its railroad. The fact of the fire being set out in the operation of the railroad is *prima-facie* evidence of negligence authorizing recovery in the absence of evidence overcoming this legal presumption. *Small v. Chicago, R. I. & P. Ry. Co.*, 50 Iowa, 338; *Rose v. Chicago & N. W. Ry. Co.*, 72 Iowa, 625. The facts alleged by the petition, in the absence of averments of negligence, show a cause of action. The motion was rightly overruled.

II. Counsel for defendant maintain that there is an absence of evidence tending to show negligence of defendant which caused the fire; but, under the doctrine of the cases above cited, the occurrence of the

Seeska v. The Chicago, M. & St. P. Ry. Co.

fire, being set out in the operation of the railroad, is *prima-facie* evidence of negligence. Under this rule the negligence was established *prima facie*. Whether this *prima-facie* case was overcome was a question of fact to be determined by the jury. There was evidence tending to show negligence on the part of defendant, as that there were other fires set out at the same time by the same engine. The jury could well have found that the *prima-facie* case against defendant was not overcome by evidence of care exercised by defendant. *Slosson v. Burlington, C. R. & N. Ry. Co.*, 60 Iowa, 215; *Lanning v. Chicago, B. & Q. Ry. Co.*, 68 Iowa, 502.

III. The plaintiff's property which was burned was insured, and the sum insured was paid by the company holding the risk. The claim by the insurance company upon defendant, arising on account of the fire, was assigned by a written instrument to plaintiff, who seeks in this action to recover thereon. Counsel now insist that the evidence failed to prove the execution of the assignment. But we think it cannot be said there is such a failure of evidence on this point as to authorize a new trial. On the contrary, we think the evidence quite satisfactorily shows that the instrument was executed by the general agent of the insurance company, who had authority to sell and transfer claims held and owned by it.

IV. The plaintiff was permitted to testify, against defendant's objection, that when he made his claim against defendant on account of his loss he had not made a settlement with the insurance company therefor. The relevancy and applicability of this evidence is not readily discernible; but we think defendant could not have been prejudiced by it. Counsel do not attempt to point out prejudice resulting from it. Conceding that the evidence was inadmissible, we cannot disturb the judgment for the error of admitting it, when it appears no prejudice resulted therefrom.

These views dispose of all questions in the case. The judgment of the district court is

AFFIRMED.

DALHOFF & Co. v. BENNETT.

Appeal: JUDGMENT ON CONFLICTING EVIDENCE. This court will not reverse a judgment based on the finding of the district court in a law case, on the ground that the finding is not supported by the evidence, which is conflicting.

Appeal from Des Moines Circuit Court.—HON. CHAS. H. PHELPS, Judge.

FILED, FEBRUARY 4, 1889.

ACTION to recover for money collected, and converted to defendant's own use. The case was tried without a jury, and judgment was rendered for defendant. Plaintiffs appeal.

Newman & Blake, for appellants.

George H. Lane and *C. L. Poor*, for appellee.

BECK, J.—I. The defendant was employed by plaintiffs to sell goods in connection with a peddling wagon. The sales were in Illinois, in 1873, where defendant claims he resided. The plaintiffs seek to recover for sums of money collected by defendant, and appropriated to his own use, for which he failed to account, and for other sums overdrawn on his salary account. The defendant denies the allegations of plaintiffs' petition, and pleads the statute of limitations as a bar to the action.

II. The plaintiffs upon this appeal base all objections to the judgment of the court below, which they urge upon our attention, upon the assumed fact that the district court founded its decision wholly upon the defense of the statute of limitations pleaded by defendant. But the abstract before us fails to disclose the

Horsley v. Hairsine.

grounds of the decision of the court below. Should we concur in the view of the counsel for defendant, that the evidence fails to show that the action is barred by the statute of limitations, the case would then be for decision upon the evidence presented in the abstract relating to the merits of the case. We would be required to determine whether the evidence on other branches of the case sufficiently supported the judgment of the district court. Assuming that the abstracts before us contain all the evidence, which is not disputed, the case is one of conflict of evidence. Plaintiffs' testimony supports their claim, while the evidence of defendant tends to establish a final settlement and payment by defendant of all sums found due plaintiff. In this state of the case, we cannot interfere with the judgment of the district court. It is therefore

AFFIRMED.

HORSLEY V. HAIRSINE.

Sale of Colts: DELIVERY AND POSSESSION: SUBSEQUENT PURCHASER: QUESTION FOR JURY. In order that a purchase of personal property, without a recorded bill of sale, may be good as against a subsequent purchaser from the same vendor, the first purchaser must have such possession as is visible, apparent and actual to strangers to the transaction. (Compare *McAfee v. Busby*, 69 Iowa, 328.) In this case, *held* that the circumstances, as shown by the evidence (for which see opinion), did not, as matter of law, show such possession on the part of defendant, who was the first purchaser, and that the question should have been submitted to the jury.

Appeal from Harrison District Court.—HON.
CHARLES H. LEWIS, Judge.

FILED, FEBRUARY 4, 1889.

ACTION for the recovery of specific personal property. Verdict and judgment for defendant. Plaintiff appeals.

Dewell & McGavren, for appellant.

F. M. Dance, for appellee.

REED, C. J.—Plaintiff claimed to have purchased the property in controversy, which is two colts, from one Smith, who claimed to have purchased from defendant's mother. Defendant's claim is that in the spring of 1885, before the colts were foaled, he contracted with his mother for the purchase of them, and that he subsequently paid the price agreed upon to her. There was evidence which tended to establish each of these claims. Mrs. Hairsine had the colts in possession at the time of the sale to Smith, which was in December, 1886. He took possession of them at that time, and when he sold to plaintiff, which was a short time afterwards, he delivered them to him.

The district court instructed the jury, in effect, that the only question for them to determine was whether there was a valid sale of the property by defendant's mother to him, and, if they found for defendant on that question, their verdict should be for him; otherwise they should find for plaintiff. The exceptions taken to the instructions are that they do not make the delivery of the property under defendant's purchase an element of his title as against plaintiff; the argument being that, while the sale as between defendant and his vendor may have been perfectly valid, still, unless it was followed by an actual change of possession, it is of no validity as against a subsequent purchaser without notice. The evidence showed that during the summer of 1885 the mares were in the possession of another son of Mrs. Hairsine, who lived some two miles from her, and that he had the use of them under an arrangement with his mother. In the fall, after the colts were weaned, it was arranged that he should care for all of the animals during the winter; defendant agreeing to pay for the care of the colts. In the following March, he returned them to his mother's farm. The colts were pastured during

Horsley v. Hairsine.

the summer, part of the time on the farm, and the balance of the time on the commons in the neighborhood. In the fall Mrs. Hairsine took them up, and as stated above, had them in possession at the time of the sale to Smith. During that summer defendant was absent from the state, and did not return until about the time of Smith's purchase. As to these facts there was no dispute, and the district court must have been of the opinion that they showed a delivery sufficient to charge a subsequent purchaser with notice of defendant's right. But in this we think the court was in error. "The possession of the person claiming personal property as against the creditors of his vendor must be visible, apparent and actual to strangers to the transaction." *McAfee v. Busby*, 69 Iowa, 328, and cases there cited. The same rule applies in the case of a subsequent purchaser. Now, defendant never had the property in his actual possession. That he had a right of possession for many months before the sale to Smith is probably true. And it is true, also, that during part of that time he was in constructive possession. But it cannot be said, as matter of law, that the circumstances with reference to the possession would indicate to a stranger to the transaction, under which he claims, that a change in the ownership of the property had taken place. That question should have been submitted to the jury, and the failure to submit it is prejudicial error.

REVERSED.

BURDETTE, SMITH & Co. v. WOODWORTH & Co. *et al.*

Chattel Mortgages: OF UNDIVIDED HALVES OF FIRM PROPERTY: PRIORITY. W. and M. were partners in the hardware business. W. mortgaged his undivided one-half interest in the stock of goods to L. to secure a debt which W. owed him. Afterwards W. purchased of M. the other undivided one-half of the stock, and, to secure a part of the purchase price, mortgaged the whole stock to him. Afterwards the whole stock was attached by other and subsequent creditors of W. and converted into money, which was in the hands of a receiver awaiting disposition by the court. The amount due on L.'s mortgage exceeded the one-half of the amount of the proceeds of the goods, and so did the amount due on M.'s mortgage. *Held*, as between L. and M.'s assignee, that each had a lien on the undivided one-half of each article composing the stock, and that each was entitled to have applied on his mortgage the one-half of the money in the hands of the receiver. [BECK, J., *dissenting*.]

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

FILED, FEBRUARY 4, 1889.

THE action was in attachment, wherein a receiver was appointed, and the attached property was converted into money. The Grinnell Barb-Wire Company intervened, and, by the judgment rendered in the case, the property was awarded to that company. Subsequently, C. Linderman intervened, claiming the property involved in the case. His claim was sustained by the court below, and a judgment to that effect was rendered. The Grinnell Barb-Wire Company and its assignor, Mather, appeal.

H. E. Parslow and G. B. Jennings, for appellant.

N. B. Moore and H. H. Scott, for appellee Linderman.

ROBINSON, J.—I. The following are the facts of the case: Woodworth, being indebted to intervenor Linderman, executed, in security of the debt, a mortgage upon his interest (one-half) in the property of a

partnership composed of himself and Mather. Soon thereafter Woodworth purchased the interest of Mather in the copartnership property and business, and the firm was dissolved. To secure notes given for the purchase of the property, Woodworth executed to Mather a mortgage upon the property acquired by him, and formerly owned by the firm. Mather transferred the notes and mortgage to the Grinnell Barb-Wire Company. The contest in the case is between the company and Linderman, and involves the question as to the interest of each in the proceeds of the stock now in the hands of the receiver.

II. The mortgage to Linderman is in form a bill of sale, and in terms conveys "the undivided half" of the stock of goods in controversy. It has no relation to, and cannot be made to include, any property or interest which the mortgagor might acquire after it was executed. Therefore, when Woodworth subsequently purchased Mather's interest in the stock, the purchase did not in any manner inure to the benefit of Linderman. Mather exchanged his ownership of an undivided one-half of the stock for notes secured by a mortgage on all the stock. He claims that he did this without actual knowledge of Linderman's mortgage, which was not then of record; but we are of the opinion that the evidence shows that he had such knowledge when his mortgage was taken. His claim as to an undivided one-half of the stock was junior to the lien of Linderman, and as to the remainder it was superior. Woodworth seems to have taken possession of the stock under his purchase from Mather, and two weeks later it was seized on attachment. The only showing as to the disposition made of it is contained in an agreement, which is as follows: "It is mutually agreed that the stock of hardware, tinware, cutlery, and property of whatsoever character described in the Linderman bill of sale, or mortgage of the Grinnell Barb-Wire Company, contested in this cause, covers one and the same stock of goods, and that through the action of the receiver appointed

by this court the said stock of goods has been converted into cash, and is now in the hands of the receiver, the sum being in the neighborhood of six hundred dollars."

The evidence does not show the value of the stock at the time of the Mather sale. The mortgage given to Mather was to secure notes amounting to \$2,596. He was to have all the accounts and notes of Woodworth & Co., and was to pay all the debts of the firm contracted in Coin, Iowa, and Woodworth was to pay any other debts of the firm which might exist. As to the value of these accounts and notes, and the amount of the indebtedness, there is little, if any, evidence. Woodworth was to keep the stock "up to three thousand dollars," but it is not shown that it was ever worth that sum; nor do we think it material, for the purposes of this decision, to know the value of the stock at any of the dates involved in this controversy. By the terms of his bill of sale, Linderman had a claim upon an undivided one-half of the stock, and of necessity that included a claim upon the undivided one-half of each article included in the stock. The same is true as to the interest in the other undivided one-half acquired by Mather. Each of the mortgages in question was given to secure individual indebtedness, and no question as to the rights of partnership creditors is involved. We cannot presume that a portion of the goods was sold to pay creditors of Woodworth and Mather, and there is no evidence to that effect. On the contrary, the agreement which we have quoted tends to show that the proceeds of the entire stock of goods are now in the hands of the receiver. The language of the agreement is that "the said stock of goods has been converted into cash, and is now in the hands of the receiver, the sum being in the neighborhood of six hundred dollars." In our opinion there is no room for the presumption that a portion of the stock has been sold for the benefit of Mather. The Grinnell Barb-Wire Company is entitled to all the rights created by the mortgage to him. Each of the claims of the company and Linderman is more than one-half of the amount of money in the

hands of the receiver. We therefore conclude that the district court erred in adjudging the lien of Linderman to be superior, as to an undivided one-half of the stock, to that created by the mortgage to Mather. One-half of the money in the hands of the receiver should be paid on the claim secured by the Linderman bill of sale, and one-half on the claim secured by the Mather mortgage. The judgment of the district court is accordingly

MODIFIED AND AFFIRMED

BECK, J. (*dissenting*).—The facts controlling the conclusions which I reach in the case are few and simple. Linderman's mortgage was executed by one partner upon his interest in the firm property, to secure a personal debt of his own. The mortgage now held by the barb-wire company was executed upon Woodworth's individual property to secure his individual debt. It will be observed that when his mortgage was executed the firm had been dissolved, and he owned all the property. Now, it cannot be doubted that the mortgage to Linderman would bind the property, except as against creditors, or others holding equities by reason of the partnership and partnership transactions; that is, as between Linderman and Woodworth, and persons claiming under them, with no rights and equities other than they possessed, Linderman's mortgage is valid and effective. The claim and debt for which the mortgage was given was not a partnership transaction. It was an individual debt, incurred for the purchase of Mather's interest in the property. Woodworth's mortgage to Mather was not a partnership transaction. It was a mortgage upon individual property to secure an individual debt. There are no partnership interests or equities in the transaction. Mather and the barb-wire company—the first being the grantee of Woodworth, and the second the assignee of the grantee—stand in Woodworth's shoes. They have no other or higher rights than he had. Woodworth had conveyed the property by an instrument which, as we have seen, passed the interest he held at the time to Linderman.

He could not convey it so as to defeat Linderman's rights, unless to one who had some equity arising from partnership rights and relations, or to one having no notice of the mortgage to Linderman. As I have pointed out, the barb-wire company has no right or equity based upon the partnership. The evidence shows that Mather had notice of the mortgage to Linderman, and that he transferred the note and mortgage as security for a prior indebtedness to the barb-wire company. Upon these facts the company must be held to have no rights different or other than those held by Woodworth and Mather, respectively.

The evidence shows that the amount due Linderman upon his chattel mortgage is six hundred and twenty-five dollars. The value of the property of the firm upon which his mortgage was executed does not clearly appear; but it is agreed by the parties that when the judgment was rendered in this case the amount of money in the receiver's hands was about six hundred dollars. The original debt to Linderman secured by the mortgage was about fifteen hundred dollars. Woodworth had paid one thousand dollars upon it. An agreement between the partners requires the stock to be kept up to three thousand dollars. We think it may be presumed, upon this evidence, that the stock of the firm was worth three thousand dollars, and Woodworth's interest in it was fifteen hundred dollars; and it will be presumed that the stock was reduced so that only six hundred dollars was left in the hands of the receiver by the appropriation of the money or property to partnership purposes; that is, all the money and property had been applied to firm debts, or used in the firm's business, except the six hundred dollars. Now, Linderman had a mortgage upon the half interest in the property, of which Mather had notice. The law will not permit the parties to dispose of the property so as to defeat Linderman's mortgage. They cannot claim that he can recover only one-half of the property remaining on hand. It will be presumed that the parties reserved his interest, and that the six hundred dollars is subject to

Giltrap v. Watters.

his mortgage. Unless this be held, the partners had it in their power to defeat Linderman's mortgage; and, as I have shown, the barb-wire company stands in Mather's shoes, and has no rights other than such as he had. Surely he could not claim any part of the six hundred dollars, and the barb-wire company cannot. Linderman, therefore, is entitled to be first paid out of it. In my opinion the judgment of the district court ought to be affirmed.

77	149
105	144

GILTRAP V. WATTERS *et al.*

1. **Appeal: TRIAL DE NOVO: WHAT EVIDENCE TO BE CERTIFIED.** In order to a trial *de novo* in this court, not only the evidence introduced, but that offered, must be certified. (See Code, sec. 2742.)
2. **—: ASSIGNMENT OF ERRORS: EQUITY CASE: TOO GENERAL.** Where an equity case appealed to this court cannot be tried *de novo* on account of a failure to certify all the evidence, it cannot be tried upon an assignment of errors which raises only the question as to what the court should find from the evidence; for that would only be a trial *de novo* under another name.
3. **Quieting Title: DENYING JUDGMENT UPON DEFAULT: NO PREJUDICE.** In an action to quiet title brought against W. and his grantees, although the grantees were in default, the court dismissed the petition as to all. *Held* not prejudicial error, since the judgment as to W. could not be reversed, and therefore judgment against his grantees in default could have availed plaintiff nothing.

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, FEBRUARY 4, 1889.

THIS is an action to quiet the title in plaintiff to certain real estate in Jones county. The court below dismissed the petition, and the plaintiff appeals.

Sheean & McCarn, for appellant.

E. Keeler and *Remly & Ercanbrack*, for appellees.

GRANGER, J.—I. The appellees present the question that this case is not triable *de novo* in this court, for the reason that the certificate of the judge does not meet the requirements of section 2742 of the Code. The appellant's abstract does not set out the certificate, but contains a statement with reference to it which, if true, would be sufficient. The appellees file an amended abstract, setting out the certificate, showing that the testimony is that introduced, and not that offered, on the trial. Under repeated rulings of this court, this is a fatal defect, where a trial anew is sought. In fact, we think the appellant concedes this question, as the point is first presented by appellees, and no reply is presented, nor in fact do we see how the question could be successfully met.

II. The abstract contains an assignment of errors, and no question is made of our right to try the cause on assignment of error, but appellees insist that the assignment is insufficient. The first assignment is as follows: "Court erred in refusing to quiet plaintiff's title against the defendants in default." The nine other assignments present only questions of what the court should find from an examination of the testimony, and the ninth is that "the court erred in dismissing plaintiff's petition, and rendering judgment against plaintiff for costs." It needs no argument to show that the consideration of such an assignment would lead to a trial of the cause anew, for it could only be determined on an examination of the testimony. It is only an indirect way of leading the court to do that which it could not do directly. The other assignments are open to the same objection. They are too general. See Code, sec. 3207; *Tomblin v. Ball*, 46 Iowa, 190.

III. If there was error as to the first assignment, it is entirely without prejudice, as the defendants in

Melhop, Son & Co. v. Seaton.

default are the grantees of the appellees, and a judgment by default as to them could be of no avail, if the present judgment is to stand, and we think it must. This disposition of the case renders it unnecessary to pass upon the motions filed.

AFFIRMED.

MELHOP, SON & CO. v. SEATON *et al.*

1. **Attachment: RELEASE OF PROPERTY ON AGREEMENT: LIABILITY OF OFFICER.** Where the plaintiff in an attachment suit and the defendant therein agree upon terms of settlement, and thereupon direct the officer to release the attached property, the officer is not afterwards made liable for so doing by the defendant's failure to comply with the terms of the agreement of settlement.
2. **The Same: EVIDENCE.** In such case, all evidence tending to show the agreement discharging the property was rightly admitted in behalf of the officer, and was not vulnerable to the objection that it contradicted his endorsement on the writ.
3. **The Same: ESTOPPEL OF OFFICER BY JUDGMENT.** The judgment in the attachment case directing the property to be sold did not estop the officer from showing that he released it upon the agreement; for he was not a party to that case, and was not bound by the judgment.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FILED, FEBRUARY 5, 1889.

ACTION upon the official bond of a sheriff to recover for the alleged failure of the sheriff to deliver to his successor in office certain property seized by him upon an attachment, to be sold upon a special execution issued on a judgment rendered in the action wherein the attachment was issued. There was a trial to the court without a jury, and a judgment for defendants. Plaintiffs appeal.

M. P. Smith and J. W. Jamison, for appellants.

Thompson & Lanning, for appellees.

BECK, J.—I. The controlling facts in the case, which are undisputed, or are established by the preponderance of the evidence, are these:

1. ATTACHMENT: Plaintiff brought an action against Tathwell, and an attachment, issued in the case, was served by defendant Seaton, the sheriff, by seizing a certain stock of merchandise, which is shown by an endorsement upon the writ, dated January 19, 1885. The writ was returned with the following additional endorsement: "By order of C. J. Deacon, I now return this writ, August 8, 1885. B. F. Seaton, Sheriff." Deacon, named in this return, was the attorney of the defendants in the attachment, and the return was made pursuant to the agreement made by the attorney of the plaintiff and representatives of other creditors and the defendant in attachment, settling and compromising the claims against him. This agreement was made in the presence of the sheriff, who, acting thereon, returned the writ, April 25, 1887. The cause was submitted to the court, and it was found that the agreement for the settlement had not been performed, and defendant had not paid the amount fixed by the terms of the settlement. Therefore the court rendered judgment against the defendant, and entered an order for the sale of the property attached.

II. We are of the opinion that there was evidence tending to prove that the defendant had returned the writ of attachment, and released the property, pursuant to an agreement of settlement between plaintiff's attorney and defendant. The district court doubtless so found, and there is no ground for holding that the finding is not supported by the evidence. Upon this state of facts the defendant could not be held liable for the release of the property. The parties were authorized to settle the case, and to stipulate for the discharge of the property attached. After such a settlement and stipulation, it would be

Melhop, Son & Co. v. Seaton.

monstrous injustice to hold the sheriff liable when he had done just what the parties had agreed to do. But it is said that the defendant in the attachment did not perform his part of the agreement. Let this be admitted. But the sheriff did not become the guarantor for the performance of defendant's contract. The agreement for the discharge of the property was not conditional upon the performance by defendant of the contract. Upon entering into the agreement the sheriff was directed to release the goods, which he did, pursuant to the settlement. We are clearly of the opinion that the sheriff is not liable by reason of the subsequent failure to perform the agreement on the part of defendant in attachment.

III. The evidence tending to establish the agreement for settlement and discharge of the attachment was objected to on the ground, among
 2. **The same :**
 evidence. others, that the endorsement made by the sheriff upon the attachment cannot be contradicted by parol, and is conclusively binding upon him. But in our opinion the evidence does not contradict the return of the officer, which shows a seizure of the property. But it cannot be doubted that the property may be discharged from the attachment by agreement of the parties. The evidence objected to does not contradict the return of the officer. It simply shows a discharge of the property by agreement. All the evidence objected to which tended to establish the agreement discharging the property was rightly admitted. We find no error in the court's rulings upon the questions involving the admission of the evidence.

IV. The order in the attachment case, directing the property attached to be sold to satisfy the judgment, does not estop the defendant in this case.
 3. **The same :**
 estoppel of
 officer by
 judgment. He was not a party to that case, and the order was not, therefore, an adjudication binding him. These considerations dispose of all questions in the case. The judgment of the district court is

AFFIRMED.

Parks v. Garner.

PARKS V. GARNER.

Appeal: TRIAL DE NOVO: CERTIFYING EVIDENCE. Where the abstract fails to allege, or show, that it is an abstract of all the evidence, a trial *de novo* cannot be had in this court. It is not sufficient that the certificates of the judge and reporter are printed in the abstract showing that all the evidence is contained in the report of the short-hand reporter.

Appeal from Pottawattamie District Court.—HON. H. E. DEEMER, Judge.

FILED, FEBRUARY 5, 1889.

ACTION in chancery to set aside a decree of foreclosure of a mortgage, and the sale of the land thereunder, and to redeem from the mortgage. There was a decree dismissing plaintiff's petition, after a trial on the merits. Plaintiff appeals.

Henry Ford and Wright, Baldwin & Haldane, for appellant.

Mayne & Hazleton, for appellee.

BECK, J.—This case is here for trial *de novo*. The abstract fails to allege, or show, that it is an abstract of all the evidence. The certificates of the judge and reporter are printed in the abstract, showing that all the evidence is contained in the report of the short-hand reporter. This it has been often held is not sufficient. As the case is triable *de novo*, and the abstract upon which it is submitted to us fails to show that it is an abstract of all the evidence, it cannot be reviewed upon this appeal. The decree of the district court must be

AFFIRMED.

**BARTLETT V. THE FIREMAN'S FUND INSURANCE
COMPANY.**

77	155
102	564
77	155
111	356

1. **Fire Insurance: ADMISSIONS OF AGENT: WHEN BINDING ON COMPANY: EVIDENCE.** Defendant's agent was empowered to adjust and pay the loss in question if defendant was liable. While acting within the scope of his authority, and with reference to the loss in question, he admitted that the defendant would be liable but for the existence of a certain mortgage upon the property when the policy was issued. *Held* that these admissions were binding on defendant, and that it was competent to prove them against defendant to establish plaintiff's claim (denied by defendant) that defendant had assumed the risk by an agreement with the company which issued the policy.
2. **Evidence: ADMISSION: ERROR WITHOUT PREJUDICE.** There is no prejudicial error in admitting evidence when the fact which it tends to prove is established by other competent and uncontradicted evidence.
3. **Fire Insurance: AGREEMENT TO REINSURE: STATUTE OF FRAUDS.** The statute of frauds has no application to a contract entered into by one insurance company with another, whereby the first company assumes absolutely the risks taken by the second one. It is not a contract to answer for the debt or default of another.
4. **Instructions: ERROR WITHOUT PREJUDICE.** Plaintiff in his reply pleaded an estoppel, but the evidence did not tend to support it, yet the court submitted the question to the jury. But the only effect of the estoppel, if it had been proved, would have been to establish a fact which was otherwise fully established. *Held* that the submission of the question could not have prejudiced defendant, no matter how the jury found upon it.
5. **Fire Insurance: PROVISION AGAINST MORTGAGE: WAIVER BY AGENT.** If an agent who takes a risk of fire insurance knows at the time that the property is mortgaged, it is a waiver for the company of a clause in the policy that it shall be void if the property is encumbered.

*Appeal from Muscatine District Court. — HON.
CHARLES H. WATERMAN, Judge.*

FILED, FEBRUARY 5, 1889.

Bartlett v. The Fireman's Fund Ins. Co.

THIS is an action on a policy of insurance against loss or damage by fire. The policy was issued by the New York Alliance. Plaintiff alleged in his petition that defendant, by contract with that company, reinsured the property, and thereby became bound to pay the loss. Defendant's answer contains a general denial. It also alleged that the policy was void because of the existence of a mortgage upon the property,—there being a provision that "if the property, or any part thereof, is, or shall hereafter be, encumbered, without the consent of the company written herein, then, and in every such case, this policy shall be void;" and consent thereto was not indorsed on the policy. Plaintiff pleaded in his reply that the company issuing the policy had knowledge, at the time, of the existence of the mortgage, and that the provision was waived. He also alleged that when defendant was notified of the loss it did not deny that it had reinsured the property, but refused to pay solely on the ground that the policy was void because of the violation of the provision against encumbrances, and that, relying on the belief that defendant was liable, he had omitted to prosecute any action against the company that issued the policy, and that he could not now maintain such action, because of the lapse of time since the loss,—there being a provision in the policy barring the right of action thereon after one year from the date of the loss, and said company having ceased to do business in this state; and he alleged that by reason of these facts defendant is estopped from denying that it had reinsured the property. There was a verdict and judgment for plaintiff, and defendant appeals.

J. Carskaddan, for appellant.

Cloud & Doran and *E. F. Richman*, for appellee.

REED, C. J.—I. To establish the allegation that defendant had reinsured the property, plaintiff offered, and against defendant's objection was permitted to introduce, in evidence two letters written by one Thomas S. Chard, manager of defendant's business at Chicago; and it

1. FIRE INSUR-
ance: admis-
sions of agent:
when binding
on company:
evidence.

Bartlett v. The Fireman's Fund Ins. Co.

was proven that Muscatine, where the property insured was situated, was included in his district. The first of these letters was written after the loss, but before Chard was informed of it. In that letter he informed plaintiffs that defendant had reinsured all of the western risks of the New York Alliance, and solicited a renewal with defendant when the policy should expire. The other letter was written after he was informed of the loss, and was in answer to one written to him on the subject. In it he also admitted the contract of reinsurance, but refused to pay the loss, on the ground that the policy was void because of the existence of the mortgage when it was issued. Plaintiff was also permitted to give evidence of declarations and statements of Chard to the same effect, in an interview subsequently had between the parties. The objection urged against the admission of this evidence is that it tended simply to prove the admissions of the agent, made subsequent to the transaction sought to be established; and it was contended that its admission was in violation of the rule that the admissions of an agent are receivable in evidence against the principal only when they constitute part of the *res gestæ*. We are of the opinion that the letter last written by Chard was properly admitted in evidence; also that his admissions and declarations subsequently made, in the conversation with plaintiff, are admissible. The admissions related to a past transaction, it is true. It may also be conceded that they related to a transaction with which he had no connection. But they were made while he was acting within the scope of his agency, and they related to the subject with reference to which he was empowered to act for the principal. He was empowered to adjust and pay the loss, if the company was liable. The question of liability was the matter intrusted to him by the principal, and it was to that question that the admissions related; their substance being that but for the existence of the mortgage when the policy was issued the company would be liable. The evidence which tended to establish them was

admissible, under the rule laid down in *McPherrin v. Jennings*, 66 Iowa, 622. See, also, the authorities cited in that case.

The evidence as to the admissions was uncontradicted, and it was sufficient to establish the alleged contract of reinsurance; there being no other evidence on that question. On that state of the case it might be conceded that the first letter should have been excluded, and yet we could not reverse on that ground. The fact which it tended to prove being established by other competent and satisfactory evidence, and there being no conflict in the question, its admission could have worked no possible prejudice to defendant.

II. It was contended that the agreement to reinsure the property was within the statute of frauds, and could not be established by parol. But this position is not tenable. An agreement to reinsure is not an undertaking to answer for the debt or default of the first insurer, but is an original undertaking, entered into with him, to indemnify the owner of the insured property in case a loss occurs. It is in no sense a contract of guaranty or suretyship, but under it, as between the immediate parties, the reinsurer assumes the risk absolutely. He takes the place of the first insurer, assuming his liabilities, and is bound in any event to answer for the loss, either to him or to the owner of the property, and the statute of frauds has no application to a contract of that nature.

III. The district court, by instructions which are abstractly correct, submitted to the jury the question of estoppel pleaded in the reply. The exception taken to that portion of the charge is that there was an entire absence of evidence tending to prove some of the essential elements of the estoppel pleaded. That claim may also be conceded. Indeed, we think, upon grounds other than that urged by counsel, the question ought not to have been submitted to the jury. The only effect of the estoppel, if it had been proven, would have been to establish the alleged

2. EVIDENCE:
admission:
error without
prejudice.

3. FIRE INSUR-
ance: agree-
ment to rein-
sure: statute
of frauds.

4. INSTRUCTIONS:
error without
prejudice.

Ward & Co. v. Robertson.

contract of reinsurance. But that fact, as we have seen, was otherwise proven, and, with that fact established, defendant could not be prejudiced, either by the submission of the question of the estoppel to the jury, or their erroneous finding upon it.

IV. It was contended that the finding implied by the general verdict, that the agent of the New York Alliance, who accepted the risk and issued the policy, at the time knew of the existence of a mortgage on the property, is not supported by the evidence. It must be admitted that evidence tending to prove that fact was meager, but we cannot say there was no evidence on the subject; and hence, under the rule that has long prevailed in this court, we will not disturb the verdict. The instruction of the court that, if the agent did know of the existence of said mortgage when he accepted the risk, the provision of the policy relied on was waived, is correct; being in accord with the former holding of the court on this subject. We find no ground for disturbing the judgment, and it will therefore be

AFFIRMED.

WARD & CO. V. ROBERTSON.

Landlord and Tenant: ACCESS TO LEASED PREMISES. The lessee of one portion of a double business house cannot claim a right of access thereto through the other portion,—though such access is granted by the lessor for a time as a matter of accommodation,—where there are other means of access to the leased portion, and no provision for such right is made in the written lease. If such right of access were shown to be necessary to the proper use and enjoyment of the leased portion, the case might be different.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, FEBRUARY 5, 1889.

77	159
103	633
77	159
115	206
77	159
117	787

THIS is an action in equity to cancel a lease of certain premises. There was a hearing upon the merits, and the petition was dismissed. Plaintiffs appeal.

Cole, Mc Vey & Clark, for appellants.

Baylies & Baylies, for appellee.

ROTHROCK, J.—The defendant is the owner of a block of buildings in the city of Des Moines, which is adapted to and used for business purposes. The main story consists of two rooms, which front east on Fifth street. The south side of the block is bounded by the line of Vine street. There is an arched driveway running north and south through the block, not far from its center. The tracks of the Rock Island Railroad run along Vine street, and there is an opening or doorway in the south side of the block, through which freight can be moved from cars into the building. In 1882 the plaintiffs were engaged in business as wholesale druggists, and also handled glass, oils and other heavy goods. They entered into a lease with defendant for the north part of his block, in which to carry on their business. The lease was for five years from January 1, 1883, at a rental of two hundred and twenty-five dollars per month. The plaintiffs occupied the building, and carried on their business therein until June, 1886, when they ceased its use, and sublet it to another party. While it was occupied by the plaintiffs they frequently unloaded car-loads of their freight by moving it through the door on the south side of the south room, and across the room, and through a door on the opposite side of the room, and then across the driveway, and through a door into the part of the building used by the plaintiffs. When this was done, the doors in the south room occupied by defendant were, upon the request of plaintiffs, opened to permit the freight to be unloaded in the manner above described. This was not uniformly done. At times the south room occupied by the defendant was so used in storing goods and freight

that cars could not be unloaded through his room. The defendant leased the south room to other parties before the plaintiffs sublet their room to the glass company. The glass company made application to unload goods through the south room, which was refused. This action is to cancel the lease, upon the ground that the right to move freight through the south room was a material inducement and consideration in the contract of lease; and it is claimed by the plaintiffs that, because of the refusal to open the doors in the south room to permit freight to be moved across it, the lease should be canceled.

The lease was in writing. It sets out quite fully what was to be done by the defendant in order to prepare the building for convenient use by the plaintiffs in carrying on their business. No mention is made, however, of any right of way across the south room; and it is not claimed in the petition that any mistake was made in drafting the contract. On the other hand, it appears quite satisfactorily that there was no mistake, mutual or otherwise. The writing was read over by the parties who executed it, and its contents were fully understood. There is neither allegation nor evidence of fraud, accident or mistake in the execution of the lease. There was therefore no ground for a reformation of the contract. It must be held that the contract of the parties is expressed in the writing. If there was a right of way through the south room of the building which was an easement appurtenant to the use of the north part, the action could be maintained; but, in the absence of contract, such right must be shown to be necessary to the proper use and enjoyment of the leased property. If one person convey real estate to another, which is entirely surrounded by the lands of the grantor, the grantee has the right of ingress and egress to and from the land granted; and in this case, if the doors through the south room were the only means of access to that part of the building leased to the plaintiffs, the right of way contended for would be necessarily appurtenant to the

Stewart v. McArthur.

leased premises. But the evidence shows that the unloading of freight by moving it across the south room was a mere convenience to the plaintiffs; and if the right is absolute, as claimed by the plaintiffs, it would very seriously impair the rental value of the south room. We think it cannot justly be claimed that, under the written contract which the parties deliberately made and executed, there was a right to use the south room as appurtenant to the leased premises for the purposes demanded by plaintiffs.

AFFIRMED.

77	162
90	44
77	162
115	89

STEWART V. MCARTHUR *et al.*

1. **Deed: MISTAKE: WHETHER AS TO CONSIDERATION OR ESTATE GRANTED.** Where an agreement for the sale of land provides for a certain sum to be paid therefor, and reserves to the grantor and his tenants the crops growing on the land, and the right of possession until the crops can be harvested, but such reservation is omitted, by mistake, from the deed, the mistake relates to the estate conveyed, and not to the consideration to be paid.
2. **———: ———: REFORMATION: EVIDENCE.** The evidence offered in this case (see opinion) to prove plaintiff's claim that, in the agreement for the sale of land to defendants, the growing crops were to be reserved to himself and tenants, together with the right of possession until such crops could be harvested, and that such reservation was by mistake omitted from the deed, *held* not to be of that clear and satisfactory character which is necessary for the reformation of a written instrument.
[BECK, J., *dissenting.*]

Appeal from Lee District Court.—HON. J. M. CASEY,
Judge.

FILED, FEBRUARY 5, 1889.

THIS is an action in equity to reform a deed, and to recover damages for the alleged wrongful entry upon the premises conveyed by the deed, and the destruction of crops growing thereon. The district court rendered

Stewart v. McArthur.

a decree reforming the deed as prayed, and awarding to plaintiff damages in the sum of one hundred and seventy dollars. The defendants appeal.

Anderson & Davis, for appellants.

Craig, McCrary & Craig and *S. M. Casey*, for appellee.

ROBINSON, J.—In June, 1887, the defendant James McArthur purchased of plaintiff a tract of land which contained about eighty acres, for the agreed price of fifty dollars per acre. The sale was negotiated by one Mitchell as the agent of plaintiff, and by one Gilchrist as the agent of McArthur. When the negotiations were concluded, Gilchrist delivered to Mitchell a check for the purchase price, and received in return a writing, of which the following is a copy :

“FT. MADISON, IOWA, June 8, 1887.

“This is to certify that I am agent of Charles Stewart, and have authority to sell the east half of the northeast quarter of section 14, township 67, range 5, Lee county, Iowa, seventy-six and forty-four one-hundredths acres, at fifty dollars per acre, and have sold the same to James McArthur for \$3,822, and have received a check for the same.

“[Signed]

MITCHELL.”

This writing and the check were deposited in bank, to be there left until the deed and an abstract of title should be made and deposited in the bank. The deed was executed on the tenth day of June, 1887. It was in form an ordinary deed of conveyance, without reservation. It recited a consideration of \$3,822, and contained the following: “And I hereby covenant with the said James McArthur that I hold said premises by good and perfect title ; that I have good right and lawful authority to sell and convey the same ; that they are free and clear of all liens and encumbrances whatever ; and I covenant to warrant and defend the title to the said premises against the lawful claims of all persons whomsoever.”

Stewart v. McArthur.

The check was paid and the deed delivered on the thirteenth day of June, 1887, and on the same day McArthur took possession of the land. At that time a railway divided the land into two parts. That north of the right of way included about sixty-five acres, and was cultivated by tenants of plaintiff, who had crops growing thereon. The part south of the right of way was cultivated by plaintiff. Plaintiff purchased from his tenants their right to the crops north of the track, as he alleges, "about the twelfth and fifteenth days of June." It seems to be conceded that McArthur purchased the land to remove therefrom earth to use in constructing railway embankments, but it is not shown what was done on the land, or what crops, if any, were injured or destroyed. It was agreed by the parties to the suit that if plaintiff was found to be entitled to recover, the amount of his recovery should be the sum he paid to his tenants for their crops.

I. It is claimed by the plaintiff that the consideration expressed in the deed was not the actual consideration for the conveyance, but that a part of the consideration was the reservation to plaintiff and to his tenants of all growing crops on the premises conveyed, and the right of possession of said premises until the crops were matured and could be harvested; that such reservation should have been expressed in the deed, and that the parties thereto intended to so express it; but that it was omitted by accident and mistake. Plaintiff also claims that on or about June 15, 1887, defendants took possession of the premises, and destroyed growing crops of the value of two hundred and fifty dollars. The alleged reservation could have been made a part of the agreement of sale, but it is evident that it was not a part of the consideration McArthur was to pay for the land. He was not entitled to the possession of the premises excepting by virtue of the deed in controversy; hence the right to the possession until the crops should have matured and been harvested could not have passed from him to plaintiff as a part of the consideration for the

1. DEED: mistake: whether as to consideration or estate granted.

Stewart v. McArthur.

deed. If the claim of plaintiff in regard to the agreement of sale be true, then the deed in terms conveyed a greater estate than the parties thereto had intended to transfer thereby, and the mistake related to the interest conveyed by plaintiff, and not to the consideration to be paid by McArthur.

II. There is some conflict in the evidence as to the agreement of sale. Mitchell testifies that McArthur was to pay fifty dollars per acre, and have ^{2. —: —: reformation: immediate possession of that portion of the evidence.} land situate south of the railway, but that the growing crops on the north side of the railway were reserved; and that the understanding he had was that the renters occupying the ground on the north side of the track were to be permitted to finish cultivating and harvesting the crops. He is contradicted as to the alleged reservations by Gilchrist, who testifies that nothing whatever was said during the negotiations in regard to reserving the crops; that at one time the crops were mentioned, but that Mitchell said "they would not quibble about that." No one but Mitchell and Gilchrist was present when the agreement was made; and, if there were no other evidence than their testimony, plaintiff would necessarily fail in this action. But Gilchrist is corroborated by the memorandum of agreement which we have set out, and by the deed in question. Neither of those instruments suggests any reservation, but both tend to prove that there was none. Plaintiff testifies that in giving Mitchell the terms of sale he instructed him that if defendants were to enter into possession of the lands on the north side of the track, they were to pay the tenants for the damage done to the crops, but Mitchell does not claim to have made that condition a part of the agreement. Both plaintiff and Mitchell testify that Gilchrist admitted to them, after the agreement was made, that it reserved the crops; but this is denied by Gilchrist. It appears that a few days before the agreement was made, or during the latter part of the month of May, 1887, the land in controversy was offered to defendants at forty dollars per acre, but

Stewart v. McArthur.

was refused, because their agent thought it was not properly situated. It also appears that plaintiff commenced purchasing the crops of his tenants before the deed was delivered, and before any question as to the alleged reservation was raised. These facts tend to corroborate the claim of defendants that the crops were not to be reserved, but were included in the price paid. Before the reformation of a written instrument will be decreed on parol evidence the alleged mistake must be established by clear and satisfactory evidence. *Wachendorf v. Lancaster*, 61 Iowa, 509, and cases therein cited; *Clute v. Frasier*, 58 Iowa, 271; *Gelpcke v. Blake*, 15 Iowa, 389. In our opinion the evidence in this case entirely fails to meet the requirements in such cases, and the district court erred in decreeing a reformation of the deed. The conclusion we have reached renders a consideration of other questions discussed by counsel unnecessary. The decree of the court below is

REVERSED.

BECK, J. (*dissenting*).—I. It is not disputed that the land was bought by defendants for the purpose of procuring therefrom earth and sand to make a fill upon a railroad which was being constructed, and which runs through the land. It was planted in crops, and a part of the land had been rented, and was occupied and cultivated by plaintiff's tenants. These facts seem to have been known to the principals and agents. Plaintiff alleges that, in the contract of purchase and sale, defendants agreed that if they entered upon the land rented they were to pay the tenants the damages done the crops. The plaintiff was to harvest the crops on the part of the land cultivated by himself, if he could do so before defendants wanted possession of it; if he could not, they were to destroy the crops. About sixty-five acres of the land were rented, and twelve cultivated by plaintiff. The agent of plaintiff making the sale testifies that the contract was made as claimed by plaintiff; while defendants' agent testifies that there was no agreement to compensate plaintiff's tenants in case defendants

Stewart v. McArthur.

occupied the land. Plaintiff testifies that he authorized his agent to make the sale on these terms, and the defendant, who employed the agent to do the business, declares that nothing whatever was said to him upon that point. The direct evidence *pro* and *con.* on the point is nearly balanced, with preponderance for plaintiff. But the preponderance of the corroboration is on the side of plaintiff. Plaintiff and his agent both claimed, almost immediately after the contract of sale was made, that it was upon the terms indicated. This claim was made to defendants' agent, who did not deny it, as these two testify. It is true that he testifies to the contrary; but here there are two against one. The plaintiff's testimony, in our opinion, is corroborated on this point by the facts of the case. The defendants could not have, under the law, interfered with the tenants' possession. The sale was subject to their lease. Plaintiff purchased the tenants' rights two or three days after the deed was made. Defendants do not claim that plaintiff agreed to make this purchase of the tenants for defendants' benefit. Their witnesses testify to the effect that no agreement was made in regard to the tenants' possession, and that nothing whatever was said about it. In view of the fact that as the use to which defendant intended to devote the land, which was known to plaintiff, would require the destruction of the crops, it seems to us that intelligent and prudent men, as these parties doubtless are, would have arranged in their contract therefor, and plaintiff, in the absence of any agreement binding him to pay the tenants, which is not claimed, would not have paid them unless the defendants had agreed to reimburse him as he now claims. In view of all these considerations, we reach the conclusion that the preponderance of the evidence supports plaintiff's theory in the case. We therefore find that defendants did agree to pay the value of the tenants' crops.

II. The action is brought to reform the deed as to the consideration, and to recover the sum paid the tenants as a part of the consideration for the sale of the land.

Riddle v. Beattie.

We think it is wholly unnecessary to reform the deed in order to establish and recover the true amount of the consideration, which can be shown without being regarded as contradicting the deed. *Trayer v. Reeder*, 45 Iowa, 272; *Puttman v. Halley*, 24 Iowa, 425; *Day v. Lown*, 51 Iowa, 364. When the consideration is thus shown, and it is made to appear that the grantor has not received the full amount thereof, he has established a cause of action against the grantee for the sum remaining unpaid.

III. But if it be held that the obligation of defendants to pay for the crops taken and destroyed does not pertain to the consideration for the land, but is another and distinct contract, plaintiff nevertheless has the right to recover thereon in an action against defendants.

IV. In this case, as we find the facts, plaintiff has established a right to recover against defendants. His action thereon, it is true, could or should have been prosecuted at law; but as no objection was made at any time based upon that ground, the parties will, under familiar rules recognized by decisions of this court, be regarded as having waived it, and the plaintiff may recover in this action. The decree of the district court in, my opinion, ought to be affirmed.

RIDDLE V. BEATTIE.

1. **Trust: WHAT IS NOT.** Plaintiff conveyed real estate to T. in consideration of T.'s agreement to furnish support to plaintiff during life, and afterwards, by agreement between plaintiff and T. and defendant, T. conveyed the land to defendant, who assumed the obligation to furnish support to plaintiff. *Held* that by these transactions no trust was created as between plaintiff and T., or plaintiff and defendant.

77	168
80	147
77	168
87	244
77	168
113	200
77	168
133	726
77	168
140	311

Riddle v. Beattie.

2. **Statute of Limitations: AGREEMENT TO SUPPORT FOR LIFE.** An action for a breach of an agreement to support plaintiff for life is not barred by the statute of limitations during plaintiff's life. The length of time for which recovery may be had is a different question, not arising in this case.
8. **Practice: WRONG FORUM: RESULT.** The fact that an action at law is erroneously brought as an action in equity is no ground for demurrer or abatement, but only for a motion to transfer to the law docket and for a corresponding change of the proceedings. (See cases cited in opinion.)

Appeal from Floyd District Court.—HON. JOHN B. CLELAND, Judge.

FILED, FEBRUARY 6, 1889.

ACTION in chancery to enforce a contract for plaintiff's support by an order compelling defendant to pay plaintiff a sufficient sum to be used for that purpose, and for other and further relief demanded by equity. A demurrer to the petition was sustained. Plaintiff appeals.

Robert Eggert, for appellant.

R. G. Reiniger, for appellee.

BECK, J.—I. The petition alleges that plaintiff, with another, conveyed certain real estate to one Townsend, in consideration of support to be furnished during their lives, which he bound himself by written contract to furnish. The other person joining with plaintiff in the contract died. Soon after, Townsend conveyed a part of the real estate to another, taking a mortgage to secure the payment of the purchase money. Afterwards, Townsend and plaintiff, being desirous to cancel Townsend's contract, for that purpose entered into an oral contract with defendant that he should assume and carry out Townsend's contract for plaintiff's support, and, in consideration thereof, Townsend should convey to him the land and assign the mortgage; which were done accordingly, and defendant thereby

acquired title to the land and the mortgage. Thereupon the writing between plaintiff and Townsend was canceled and destroyed. It is alleged that defendant, though required so to do, refused to perform his contract for plaintiff's support. The plaintiff prays for relief in the following language: "Wherefore plaintiff prays that defendant be ordered to pay the plaintiff a sufficient sum to maintain and support herself during her natural life, or that an account be taken of the personal property so received by the defendant, including said Galuckson mortgage, and its present value be determined by adding to the principal the accrued interest, and that plaintiff may have judgment against defendant for said value, and for any other and further relief which the court may deem just and equitable in the premises, and for her costs." To the petition defendant interposed a demurrer, based upon the following language: "(1) Said petition shows on its face that the alleged cause of action and trust are barred and covered by the statute of frauds; (2) that the alleged trust which plaintiff seeks to enforce was not made in writing; (3) that the alleged cause of action is barred by the statute of limitations; and (4) that the facts alleged in plaintiff's petition do not entitle the plaintiff to the relief demanded in said petition, nor to any relief in equity." The district court sustained the demurrer, and plaintiff, refusing to further plead, dismissed her petition.

II. In our opinion the district court erroneously sustained the demurrer. There is no question of trust in the case. The facts alleged in the petition do not establish a trust, arising either between plaintiff and Townsend, or plaintiff and Townsend and defendant. The petition shows that Townsend undertook to support plaintiff, and, in consideration of such agreement, the land was conveyed to him. There it not a word in the petition showing a trust arising in the transaction. Defendant held the absolute title, free from any trust, and became liable to plaintiff as upon any other contract, in case he failed to perform his obligation to support her. Defendant assumed and

1. TRUST: what
is not.

Bush v. Nichols.

undertook to carry out Townsend's contract, and of course became bound just as he was bound by the obligation of the contract, and not as a trustee.

III. The action is not barred by the statute of limitations, for the reason that defendant's contract is continuing, binding defendant to support plaintiff as long as she lives. Defendant is liable for breaches of the contract while it continues in force, which will be as long as plaintiff lives. The length of time for which recovery may be had in an action is a different question, not arising in this case.

2. STATUTE of limitations: agreement to support for life.

IV. Plaintiff's cause of action for a breach of the contract doubtless is at law; but this is not a ground of demurrer and abatement of the action. For

3. PRACTION: wrong forum; result.

the error in the choice of the forum, the proceeding, and the relief asked, the defendant should have sought, by motion, the transfer of the action to the law docket, and a change of the proceedings accordingly. Code, sec. 2514; *Gibbs v. McFadden*, 39 Iowa, 371; *Brown v. Mallory*, 26 Iowa, 469; *Byres v. Rodabaugh*, 17 Iowa, 53; *Conyngham v. Smith*, 16 Iowa, 471.

These considerations dispose of all questions in the case. The judgment of the district court is

REVERSED.

BUSH V. NICHOLS.

Instructions: EXCEPTIONS TO: TIME. In order to secure a review of instructions on appeal they must be excepted to either at the time when given, or within three days after the verdict. The time for excepting is not extended by an agreement and order allowing time for filing a motion for a new trial. (See cases cited in opinion).

Appeal from Hancock District Court.—HON. J. B. CLELAND, Judge.

77	171
77	429
77	171
96	512
97	87
101	736
77	171
106	164

FILED, FEBRUARY 6, 1889.

ACTION for the recovery of damages for an alleged assault and battery. Verdict and judgment for the defendant. Plaintiff appeals.

Bush & Wichman, for appellant.

A. C. Ripley, for appellee.

REED, C. J.—The only questions argued by counsel for appellant are as to the correctness of certain instructions given by the district court to the jury. No exceptions were taken to the instructions at the time they were given. By agreement of the parties, however, time was extended to plaintiff until the next term after that at which the cause was tried to file a motion for a new trial. On the first day of the next term, which was three months after the trial, he filed his motion for a new trial, in which he for the first time alleged exceptions to the instructions. It is provided by statute (Code, sec. 2789) that “either party may take and file exceptions to the charge or instructions given, or the refusal to give any instructions offered, within three days after the verdict, and may include the same in a motion for a new trial.” It is clear that under the provision to preserve an objection to instructions given, the exception must be taken and filed within three days after the verdict. The agreement and order extending the time for filing the motion for a new trial did not have the effect to extend the time for filing the exceptions, for while it is allowable to include such exceptions in the motion, they may be otherwise preserved. The point has frequently been passed upon by this court. See *Harrison v. Charlton*, 42 Iowa, 573; *Bailey v. Anderson*, 61 Iowa, 749; *Clark v. Reiniger*, 66 Iowa, 507. And it is well settled that unless exceptions are duly taken to instructions they will not be reviewed by this court. We cannot therefore consider the question argued by counsel. The judgment must be

AFFIRMED.

JONES & DICKEY v. GIVENS *et al.*

Appeal: FROM VERDICT WITHOUT JUDGMENT. This court has no jurisdiction to entertain an appeal from a verdict on which the record fails to show that a judgment has been entered. (Compare *Shannon v. Scott*, 40 Iowa, 629.)

Appeal from Fremont District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, FEBRUARY 6, 1889.

W. P. Ferguson, for appellants.

James McCabe, for appellee

GRANGER, J.—The facts of this case are immaterial, as a defective record necessitates the dismissal of the appeal. The cause was tried to a jury, and a verdict returned. The record nowhere shows that a judgment was ever entered. The Code specifies from what actions of other courts of record this court has appellate jurisdiction. Code, secs. 3163, 3164. No provision is made for an appeal from the verdict of a jury. It will be seen by reference to section 3163 that the question is a jurisdictional one. The language is: "The supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record," etc. *Shannon v. Scott*, 40 Iowa, 629, was a case in which the abstract, as in this case, failed to show a final judgment. The court used this language: "That there was final judgment against appellant in the court below is therefore indispensable to the right of appeal, and without it we cannot examine into the errors assigned." The record in the case is brief, and we have examined it with care, and for the benefit of the parties in interest we will say that we are agreed that a disposition of the case on the merits would result in sustaining the action of the court below. The appeal is

DISMISSED.

77	173
108	252

77	173
119	127
77	173
1125	74

77	174
80	567

77	174
83	252

77	174
85	283

77	174
97	623

77	174
103	280

77	174
111	361

77	174
114	185

77	174
142	105
142	204

KEY V. THE DES MOINES INSURANCE COMPANY.

1. **Insurance Against Wind: FALSE STATEMENTS AS TO ENCUMBRANCE: KNOWLEDGE OF AGENT.** The property insured in this case was held by plaintiff under a title bond, on which plaintiff had paid some interest, but none of the principal, and the interest so paid, and the money expended for the insured building, was the extent of the plaintiff's interest in the property. Defendant's soliciting agent was, at the time of taking the application, informed of these facts, but it was his opinion that they created no encumbrance on the property, and in accordance with that opinion plaintiff stated in the application that the property was not encumbered. *Held* that the knowledge and conduct of the agent bound the company, and that it could not avoid liability on the policy on account of the false statement in the application, although the policy provided that any such false statement should render it void. (See cases cited in opinion.)
2. **Evidence: ERROR WITHOUT PREJUDICE.** The admission of incompetent evidence is not prejudicial when it tends only to prove a point admitted, nor when a statement proved thereby could not reasonably be regarded by the jury as relating to the point in issue. (See opinion for illustrations.)
3. **Insurance: ADJUSTMENT OF LOSS UNDER MISTAKE: EVIDENCE.** Defendant claimed that its agent adjusted the loss in question, believing that the property was free from encumbrance, when it was not; and it now seeks to avoid paying the loss on that ground. *Held* that it was proper to admit evidence tending to show that the adjusting agent's attention was called to the encumbrance before he adjusted the loss.
4. **Instructions: ERROR WITHOUT PREJUDICE.** An instruction which requires plaintiff to establish facts, which the statute says shall be regarded as true, cannot be prejudicial to defendant, though there is no evidence of the facts referred to in the instruction. (See opinion for illustration.)
5. **New Trial: SURPRISE: EVIDENCE NOT PREJUDICIAL.** A new trial is properly refused on the ground of surprise in certain testimony, where it appears that such testimony was not prejudicial to appellant.

Appeal from Taylor District Court.—HON. R. C. HENRY, Judge.

FILED, FEBRUARY 6, 1889.

THIS is an action on a policy of insurance, to recover for loss sustained by reason of a high wind. The cause was tried to a jury, and a verdict and judgment rendered in favor of plaintiff. The defendant appeals.

Cole, Mc Vey & Clark, for appellant.

Crum & Haddock, for appellee.

ROBINSON, J.—The policy of insurance upon which this action was brought in terms insured plaintiff against loss or damage by high winds, cyclones or tornadoes, on his dwelling house and contents, to the amount of three hundred dollars, for the term of five years, commencing on the second day of May, 1883. On the fourteenth day of April, 1886, the property aforesaid was destroyed by a high wind. A few days after the loss it was adjusted by an agent of defendant at two hundred and fifty dollars. Plaintiff demands judgment for that amount, with interest, and recovered it in the court below.

I. The policy was issued on the application of plaintiff, taken by a soliciting agent of defendant, and prepared by him. The application stated

1. INSURANCE
against wind:
false state-
ments as to en-
cumbrance:
knowledge of
agent.

that the plaintiff was the sole and undisputed owner of the property on which insurance was desired, and that it was not encumbered, and warranted such statements to be true. The policy contained a provision making the application a part of the policy, and a warranty on the part of plaintiff, and making the policy void if there was any encumbrance existing upon any of the property insured at the date of the policy, not made known in the application. Defendant alleges that after the adjustment of the loss it discovered that the statements of the application in regard to title and encumbrance were untrue, and that the written proof of loss

Key v. The Des Moines Ins. Co.

signed by plaintiff, and delivered to defendant, contained the same false statements; and that by reason of said false statements, and the terms of the policy, it is released from all liability on account of the loss. It was admitted by both parties on the trial that plaintiff at the time the application was made resided on the land in question, and in the house destroyed; that he held the land by title bond, and that no part of the purchase price of said land had been paid; that some interest had been paid; and that the improvements on the land and the interest paid represented all the interest of the plaintiff in the premises. There is conflict in the testimony as to what was said at the time the application was proposed, but the plaintiff testified, and the jury were authorized to find, that the terms on which plaintiff held the land, the amount of the purchase price and time of payment were fully explained to the agent; that the agent then said "that did not tell in the policy," but that in case the payment became due, and plaintiff obtained a loan on the place, he would have to send to the company for permission to do so. The facts seem to have been known to both plaintiff and the agent, but they erred in supposing that their effect was to make plaintiff the sole and undisputed owner of the land, and that the deferred payment did not constitute an encumbrance on it. It is claimed by appellant that the application was a fraud upon it, to which the plaintiff was a party, and that by reason of such fact it is not estopped from relying upon the false statements and breach of warranty as a defense. There is no ground for believing that any wrong was intended by either the plaintiff or the agent. The latter was fully informed as to the facts, and his knowledge was the knowledge of his principal. The agent stated that the facts as disclosed to him made plaintiff the sole owner of the property, and that the unpaid portion of the purchase price was not an encumbrance thereon, and he prepared the application in accordance with his opinion. When plaintiff signed the application, and when he prepared his proof of loss, he did so in accordance with the

Key v. The Des Moines Ins. Co.

defendant's theory of his title, as declared by its agent in securing the application, and without any intent to defraud. Under these circumstances, the defendant should not be permitted to take advantage of the mistake. Its agent was chiefly responsible for it. *Lamb v. Insurance Co.*, 70 Iowa, 240; *Stone v. Insurance Co.*, 68 Iowa, 740. That plaintiff knew the contents of the application when he signed it is not material, in view of all the facts in the case.

II. Plaintiff was permitted to testify that after he received his policy he sent it to defendant by one of its agents named Owen, to have a slight correction made, and asked him to take it to an officer of the company named Gatchell, and see if it "was all right;" that Owen took the policy, and returned it, with the correction made, and told plaintiff that Mr. Gatchell said: "The other is all right, as your agent told you." Defendant objected to this testimony, on the ground that Owen's acts and statements would not bind the company, but its objection was overruled. It may be conceded that it was not shown that Owen had authority to bind the defendant by his declarations and acts, but the correction of the policy is admitted, as we understand the record, and the remark attributed to Gatchell could not have been prejudicial to defendant. The alleged defect in the policy had not been mentioned to Owen, and the jury could not have understood that it was referred to by Gatchell. Whatever the remark was intended to refer to, it could not have been construed as stating that the policy was in all respects valid.

III. A witness who drove the adjuster of defendant out to the plaintiff's, when the adjustment was made, was permitted to testify that he told the adjuster, in answer to a question in regard to encumbrance on the land, that he "took a lady out that claimed she had papers against it;" that this statement was made before the adjustment was completed; and that on their way

2. EVIDENCE:
error without
prejudice.

2. INSURANCE:
adjustment of
loss under
mistake: evi-
dence.

Key v. The Des Moines Ins. Co.

back the adjuster said, in substance, that he had settled with plaintiff. In this there was no prejudicial error. Defendant did not deny the adjustment, but claimed that it was made under a mistake of fact. The conversation had with the agent before the adjustment was made tended to show that his attention was called to the matter of encumbrances in due time to have considered them before adjusting the loss.

IV. The court charged the jury that if they found from the evidence "that the soliciting agent who took plaintiff's application for insurance was authorized by defendant to receive and forward applications, and to deliver policies, and collect and transmit premiums," and that he was told the facts in regard to the title of plaintiff at the time he took the application, then his knowledge would be the knowledge of the defendant; and if defendant received the premium, and issued the policy, it would be bound by the knowledge of its agent, and would be held to have waived any misstatement in the application. This paragraph of the charge is objected to by defendant for the reason that there was no evidence that the soliciting agent had authority from defendant to deliver policies, and collect and transmit premiums. It is true that there was no evidence of that kind, but in taking the application the agent acted for defendant. Acts 18th Gen. Assem., sec. 1, ch. 211. Therefore it is chargeable with knowledge of the facts made known to the agent at that time, and the paragraph of the charge in question was erroneous in requiring greater proof than was necessary. But the error could not have prejudiced defendant, and the verdict did not depend upon the existence of the authority in question.

V. One of the grounds of the motion for a new trial was alleged surprise on the part of defendant, caused by the testimony of plaintiff in regard to the agency of Owen. It is claimed that he was never the agent of defendant, and that such fact can be shown. Waiving

4. INSTRUCTIONS:
error without
prejudice.

5. New trial:
surprise: evi-
dence not
prejudicial.

Bills v. Bills.

the question of diligence on the part of defendant in not making a showing before the submission of the case to the jury, we have to say that, in our opinion, the ground was not well taken. As already shown, the statement of Owen in regard to what Gatchell said could not have been prejudicial to defendant, and the fact of the correction of the policy was not denied. It also appears that the officer who makes the showing of surprise testified during the trial in regard to the agency of Owen.

VI. Other questions discussed by counsel for appellant have been duly considered. We discover no sufficient ground for disturbing the judgment of the district court. It is therefore

AFFIRMED.

BILLS v. BILLS *et al.*

1. **Appeal: JURISDICTION: CONSTRUCTION OF WILL.** This court has no original jurisdiction to construe a will, and it cannot, upon appeal, pass upon a point in the construction of a will which the lower court refused to consider on the ground that it was not necessary.
2. **Will: CONSTRUCTION: DUTY OF DISTRICT COURT.** In a cause involving the construction of a will as between the widow and the other legatees and devisees of decedent, where the widow claimed a fee in the real estate and absolute ownership of the personal property under the will, and the others claimed that she was entitled to a life estate only in each, *held* that it was the duty of the court to determine the question thus raised, and that it was error to find and adjudge only that which was conceded, viz., that she was entitled to hold and control all the property during her life.

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, FEBRUARY 6, 1889.

THE last will and testament of Sidney E. Bills was probated in September, 1886. Irene Bills, his widow, and one John Bender, are executors of the will. They filed a final report, in which they showed the estate to

Bills v. Bills.

be fully settled. It appears from the report that said Irene Bills is in possession of the personal property left by the testator, and that she claims the same under the will. The defendants filed objections to the report, and claimed that under the will Irene Bills was entitled to only a life estate in the personal property of the deceased as well as the real estate. It was found by the court that Irene Bills, the widow, is entitled to receive, hold and control the real estate and personal property under the will, during her life. But no determination was made as to the rights of the other parties at the death of Irene Bills, the court holding that it was unnecessary to construe the will now in that particular. Both parties appeal.

Sheean & McCarn, for Irene Bills.

J. S. Stacy, for defendants.

ROTHROCK, J.—The question presented by the parties is whether under the will Irene Bills took a life estate, or a full title to certain real and personal property. It is conceded that she is entitled to a life estate. The court did not decide the question which the parties desire to have determined. They both appealed, and they are here, as we understand it, with a consent case. This court has no original jurisdiction in such cases. We can only review decisions made by the courts of original jurisdiction. If the court erred in not entertaining and deciding the question presented, all this court can do is to remand the case, with directions that it be tried and determined in the court below. We think it is the right of the parties to have the question determined now. It is important that it be known whether the title to the property is in fee or for life, so that the widow may deal with it in the matter of selling it or in its use, knowing what her rights are. The question involves a construction of the will. The cause will be remanded to the district court for a decision. Each party will pay one-half the costs in this court. The appeal will be
DISMISSED.

COLLINS V. HILLS *et al.***Intoxicating Liquors: SALE IN ORIGINAL IMPORTED PACKAGES:**

PROHIBITION BY STATUTE: CONSTITUTIONALITY. Defendant was sought to be enjoined from maintaining a nuisance by keeping a place for the unlawful sale of intoxicating liquors. He purchased the liquors sold by him—beer and whiskey—in other states. They were put up in bottles securely sealed. The beer was packed and shipped in cases containing a certain number of bottles, and defendant sold beer in such original cases only. The whiskey was also put up in quart and pint bottles, securely sealed, each of which was enclosed in a pasteboard box, and then packed and shipped in boxes and barrels. These bottles were sold by defendant in such numbers as his customers desired, but in no case was a part of a bottle sold. *Held* that the sales of both beer and whiskey, as thus conducted, were in violation of the statutes of Iowa, and subjected the defendant to punishment for nuisance; and that such construction of the statute did not render it obnoxious to that provision of the constitution of the United States vesting in congress the right to regulate commerce between the states. (See opinion for cases cited.)

77	181
77	188
77	181
78	288
78	581
78	617
77	181
79	567
77	181
82	401
77	181
84	691
77	181
93	325
77	181
104	474

Appeal from Keokuk Superior Court.—HON. HENRY BANK, JR., Judge.

FILED, FEBRUARY 7, 1889.

THIS is an action in equity to enjoin the defendant from maintaining a nuisance. It is alleged in the petition that defendant kept, in a designated building in the city of Keokuk, a place in which he carried on the business of selling intoxicating liquors in violation of the laws of this state. On the hearing the superior court found that, at the time and in the place mentioned in the petition, the defendant kept certain intoxicating liquors, consisting of whiskey and beer, and that he was then engaged in the business of selling the same; that he purchased said liquors in the states of Ohio, Illinois and Missouri, and imported the same into this state.

The beer, when purchased, was put up in bottles, which were packed in cases, a certain number of bottles in each case. The only sale of beer made by defendant was by the case; that is, the cases were not opened by him, but were delivered to the purchasers in the same condition in which he received them from the carrier. The whiskey was also put up in bottles. One brand, purchased in Ohio, was put up in quart bottles, in each of which was blown the name of the manufacturer, and each, when filled, was securely sealed with a metallic cap, and placed in a pasteboard box, and then were packed in boxes or barrels for shipment, and were in that manner shipped to defendant. Another brand, purchased in Illinois, was put up in pint bottles, each of which, when filled, was securely closed and sealed, and these were also packed in boxes or barrels for shipment, and were received by defendant in that condition. His sales of whiskey were by the single bottle. On receiving the barrels and boxes in which the bottles were packed, he opened the same, and placed the bottles on the shelves in his store, and sold the same to his customers in such numbers as they required. He did not in any instance open the bottles, or sell the liquors in quantities less than that contained in them. When he made the purchases he intended to sell the liquors in this state in the manner pursued by him subsequently in making the sales. He was not a registered pharmacist, nor did he have a permit from the board of supervisors to sell intoxicating liquors for the purposes for which such liquors are permitted to be sold by the statutes of the state. But the purchasers bought the liquors intending to use the same as a beverage, and that intention was known to him when he made the sale. The superior court held, in effect, that the transaction of selling the beer in the manner in which it was done was beyond the power of the state to control or prohibit, but was purely a matter of commerce between the states, which could be regulated only by the congress of the United States; also that, when the boxes and barrels in which the bottles of whiskey were shipped to and

received by defendant were opened, and they were removed therefrom, the transaction, as a matter of interstate commerce, was fully consummated, and that subsequent dealings with the liquors were governed by the statutes of this state; and the judgment entered was in accordance with those views. The findings of fact set out in the judgment appear to be sustained by the evidence; and in our consideration of the case it will not be necessary to give much attention to the testimony. Both parties appeal, plaintiff's appeal being first perfected.

D. F. Miller, Sr., J. H. Anderson, H. Scott, Howell & Son, and W. B. Collins, for plaintiff.

Anderson & Davis and J. F. Smith, for defendants.

REED, C. J.—The distinction drawn by the superior court between the different transactions does not appear to us to rest upon any sound legal principle. The liquor was in each case put up by the manufacturer or dealer in another state, with a view to sales in that condition. The subsequent packing of the bottles in boxes and barrels was a mere matter of convenience in the sale and shipment of the property. When defendant purchased one hundred bottles of either beer or whiskey, he in effect purchased that number of packages of the article, and when he sold by the bottle the transaction was of the same character. The fact, that, as a matter of convenience in handling during the transportation of the property, the bottles were packed in boxes and barrels, can make no difference as to the character, in law, of the transaction. If he had the right to bring the liquor within the state, and to sell it here, he had the right to adopt such means and mode of shipment as best suited his convenience or interest; for, so far as we are advised, there is no regulation upon the subject of either state or national enactment. The right to buy and sell in such quantities as he chose is necessarily included in the right to buy and sell in any quantity. The right to bring it within the state by the car-load is as certain as the right

to bring it in by the single bottle or other package. If his interest or convenience would be better served by shipping into the state in cars fitted up with tanks, or other vessels attached to the cars, and from which the liquors must be drawn at the end of the voyage, he had the right, in the absence of statutory regulation, to adopt that mode of transportation. But in that case the liquors on their arrival within the state, would of necessity be placed in other vessels than those in which they were brought within the state; and the result of the distinction would be that, while he had the right to bring them within the state for the purpose of selling them here, yet, having brought them here in the exercise of that right, he had no right to sell them because he had adopted a mode of transportation which, although perfectly lawful, required their removal from the vessels in which they were transported. The unsoundness of the attempted distinction is shown by the absurd results to which it would lead. If he had the right to sell the liquors in the state because the transaction of their purchase and transportation was one of national, rather than state, jurisdiction, it follows necessarily that he had the right to make the sales in whatever form or quantity he saw fit. Any other holding, it seems to us, would lead to results and conclusions which, owing to their absurdity, would be shocking alike to legal judgment and the common sense of mankind.

In our opinion, then, the case turns solely on the question whether defendant had the right, notwithstanding the statute of the state, to sell the liquors within the state. And in considering that question it is important to keep in mind the scope and object of the statutes. For more than thirty years the state has sought by legislative enactments to mitigate the evils of intemperance. During all that time, however, it has regarded intoxicating liquors as a legitimate article of commerce, and the legislation has been restrictive, rather than prohibitory. The sale and use of such liquors as a beverage has been regarded as an evil so enormous as to demand the exercise of the highest powers of the state for its

Collins v. Hills.

suppression. At the same time it has been recognized that the article had its legitimate uses. The object aimed at by the legislation has been the suppression of the traffic in the article for the use wherein it has been a continuous and crying evil, and to regulate and protect it for such uses as are beneficial, or at least not hurtful. The statute forbids the sale of such liquors for use as a beverage, and prescribes severe penalties for violations of its provisions; but it allows sales of the article for use as a medicine, and in the arts, and for culinary and sacramental purposes, and prescribes certain limitations and restrictions upon the traffic for those uses. In their scope and object these statutes are not materially different from those which have been enacted for the restriction of the sale of poisons, and the regulation of the storage, handling and use of explosives, and other articles dangerous to the lives or property of the people, or deleterious to society; and they were enacted in the exercise of the same power, viz., the police power of the state. That the state has the power to enact such legislation is not now a question of doubt, and that the legislature is the sole judge of the necessity for their enactment is equally clear. Laws having the same general objects in view have probably been enacted in every state in the Union, and their validity has seldom been questioned. The validity of these particular statutes has frequently been declared by this court, and it has been adjudged by the highest tribunal in the nation that statutes having the same specific object are not in conflict with any provision of the federal constitution. *Mugler v. Kansas*, 123 U. S. 623; 8 Sup. Ct. Rep. 273. The statutes called in question in the *License Cases*, 5 How. 504, were not essentially different in their object from those of this state. They were enacted for the purpose of mitigating, and to some extent suppressing, the evils of intemperance. The statute of Massachusetts prohibited the traffic in intoxicating liquors by all persons except those holding a license from the county commissioners, and licensed vendors were forbidden to sell in quantities less than twenty-eight gallons in any single

sale. Under its provisions no person was entitled, as a matter of right, to receive a license, but the question whether any licenses should be granted in the county was left entirely to the discretion of the commissioners. A person who did not hold a license engaged in the business of selling foreign liquors, imported into the United States under the statutes thereof. He was indicted, and convicted in the state courts of a violation of the statute of the state. The other cases were under similar statutes of the states of New Hampshire and Rhode Island, and involved similar states of fact. The causes being removed to the supreme court, the judgments were affirmed. Subsequently the same claim of right was urged in these cases that is here alleged by the defendant, viz., that as the liquors were transported into the states under the authority of the federal constitution and statutes, it was not competent for the states to prohibit their sale, or regulate the manner in which it should be conducted. But the court held that the statutes were not in their operation in conflict with the commercial provisions of the federal constitution. And it appears to us that this is necessarily so. When the power of the state to legislate with reference to the subject-matter is conceded, it follows necessarily, we think, that all property within the state is subject to the regulations it has enacted. When property purchased in another state is transported to this state, and there delivered to the purchaser, to be used or consumed within the state, the transaction, in so far as it is governed by the provisions for the regulation of commerce among the states, is at an end. The sale and delivery are then consummated, and the property becomes at once subject to the laws which the state has enacted governing its use or disposition. It is true that some things are said by the court in *Bowman v. Railway Co.*, 125 U. S. 465; 8 Sup. Ct. Rep, 689, 1062, which appear to be in conflict with that view; but we do not understand that the question was involved or decided in that case. The sole question involved was as to the validity

Grouseendorf v. Howat.

of certain provisions of the statute, which forbade common carriers from transporting to any point within the state intoxicating liquors, unless they had been furnished with the written evidence of the right of the consignee to sell the same in the state. It is conceded that that subject is beyond the power of the state to legislate upon. But it by no means follows that the owner has the right, after the property has been delivered to him in the state, to use or dispose of it in a manner different from that prescribed by this state for the sale or use of such property generally. It follows from these considerations that on defendants' appeal the judgment should be affirmed, while on plaintiff's appeal it will be
REVERSED.

GROUSENDORF V. HOWAT, Judge.

77	187
78	288
78	521

Intoxicating Liquors: SALE IN ORIGINAL IMPORTED PACKAGES: PROHIBITION BY STATUTE: CONSTITUTIONALITY. *Collins v. Hills ante*, p. 181, followed.

Certiorari to Clinton District Court.—HON. ANDREW HOWAT, Judge.

FILED, FEBRUARY 7, 1889.

W. C. Grohe and *P. B. Wolfe*, for plaintiff.

A. J. Baker, Attorney General, for defendant.

REED, C. J.—The plaintiff was in a proper proceeding enjoined from carrying on the business of selling intoxicating liquors in a certain designated building in the city of Clinton. Afterwards a complaint was filed in the court, charging him with a violation of the injunction. He was cited to appear before the court and show cause why he should not be punished for contempt.

Coughlin v. Richmond.

On the trial it was shown that he had, after the injunction, sold intoxicating liquors in the building named. In defense he showed that the liquors sold by him were purchased in the state of Illinois, and were transported to him in this state by a common carrier, and that he sold the same in the packages in which they were when he purchased them, and in which they were transported to this state. The court adjudged him to be in contempt, and entered judgment against him, imposing a fine and imprisonment. He thereupon sued out a writ of *certiorari* from this court, and in obedience to that mandate the trial judge has certified the record of the proceeding to us. The judgment of the lower court is in accord with our holding in the foregoing case of *Collins v. Hills, ante*, p. 181. The writ will therefore be
DISMISSED.

COUGHLIN V. RICHMOND *et al.*

Conveyance : RESCISSION : FRAUD : EVIDENCE. The district court in this case entered a decree rescinding a deed of land and cancelling a note and mortgage given to secure the purchase price, on the ground that the grantor fraudulently pointed out and represented that the tract described in the deed extended to a certain point, when it did not, and that plaintiff therefore received less land than he bargained for. But *held* that the evidence (see opinion) was not of that clear and satisfactory kind which justifies the rescission of a contract, and that the decree should be reversed.

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, FEBRUARY 7, 1889.

ACTION in chancery to rescind the contract of purchase of certain town lots, and to cancel a note and mortgage executed by plaintiff to secure a part of the purchase money. The relief prayed for was granted by the decree. Defendant appeals.

James A. Reed, for appellant.

John M. Redmond, for appellee.

BECK, J.—I. The defendant Richmond conveyed to plaintiff “all that part of lot 6, in block 19, Carpenter’s addition to Cedar Rapids, Iowa, lying north of the Chicago and Northwestern Railway; being the same conveyed by G. Carpenter and wife to George W Giddings, February 17, 1881.” Carpenter conveyed, by the deed referred to, all of lots 6 and 7, block 19, lying north of the Chicago and Northwestern Railway Co. Giddings conveyed to Kelly, and Kelly to defendant Richmond, by the same description as is in the deed to plaintiff. Plaintiff bases his claim for the rescission of the contract of purchase on the ground of the misdescription of the property, and the fraud of plaintiff in pointing out and representing to him that the lot sold included sixteen or eighteen feet of an adjoining lot; the line being near a cellar or old wall, referred to as a landmark.

II. It is not disputed that the deed to plaintiff fails to describe the parts of lots purchased by plaintiff, omitting to cover the part of lot 7 included in the purchase. Defendant, by cross-petition, making Giddings and other prior owners of the property parties, asks that the mistake by which the misdescription occurred be corrected, and the title of the property be quieted in plaintiff. By a supplementary decree the relief as prayed for in this cross-petition was granted, except that the title was quieted in defendant Richmond.

II. The plaintiff claims that defendant represented that the land, as described and pointed out to him, included a part of an adjoining lot, and that he made the purchase relying upon these representations, which are alleged to have been fraudulently made in order to induce plaintiff to purchase the land. The district court found the facts as alleged by plaintiff, and thereupon entered a decree rescinding the contract of purchase. The evidence fails to establish to our satisfaction

Lewis v. Courtright.

that there were false and fraudulent representations as to the boundaries of the land, which induced plaintiff to make the purchase. The person making the sale for defendant, who plaintiff claims pointed out the lines, testifies that he informed plaintiff that he did not know the boundaries of the land, and stated that there was a difference and dispute in relation thereto. All that need be said is that the evidence on this point is conflicting. It surely does not bring the mind to the conclusion, without a rational doubt, that plaintiff did make the purchase upon representations as to the boundaries of the lot which were false and fraudulent. But evidence of this character which fails to produce a higher degree of credit, a fuller assent of the mind, will not authorize a decree rescinding a contract. We reach the conclusion that the district court erred in decreeing the rescission of the contract of sale. The decree, so far as it grants that relief, is reversed. It should have quieted the title in plaintiff. A decree to that effect on defendant's cross-bill will be entered in this court, or, at defendant's option, in the court below.

REVERSED.

LEWIS V. COURTRIGHT.

TRESPASS: MAKING HAY ON WILD LAND: GOOD FAITH: DAMAGES.

Defendant purchased the right to make hay on plaintiff's wild land of one whom he believed to be authorized to sell such right, but who had in fact no such authority. The uncut grass was worth not more than ten cents per acre, while the hay made from an acre was worth three or four dollars. Defendant acted in entire good faith, and cut no more grass after he was informed that he was proceeding without the owner's authority. Plaintiff sought to recover, not the value of the grass, but of the cured hay. *Held* that he could not so recover. (See opinion for cases cited.)

Appeal from Dickinson District Court.—HON. GEORGE H. CARR, Judge.

FILED, FEBRUARY 7, 1889.

ACTION to recover the possession of a quantity of prairie hay. There was a trial by jury, and a verdict and judgment in favor of defendant. The plaintiff appeals.

J. W. Cory, for appellant.

Parker & Richardson, for appellee.

ROBINSON, J.—During the year 1887, defendant entered upon a tract of land owned by plaintiff, cut the prairie grass from about eighteen acres thereof, and from the grass so cut made the hay in controversy, and stacked it on land which he controlled. Plaintiff claims that in making and removing this hay defendant committed a wilful and malicious trespass, and that in consequence he acquired no title to the hay, but that it belongs to plaintiff. It is shown that plaintiff did not by himself or agent authorize the cutting of the grass and the making of the hay, but defendant alleges, and offered evidence which tended to show, that he purchased the right to make the hay of one who claimed to have authority to sell it, and that he entered upon the land, and made and removed the hay, in good faith, with the belief that he had the right so to do. It may be conceded, for the purposes of this opinion, that defendant had no valid authority to cut the grass and make the hay in question, but there was evidence which justified the jury in finding that he believed he had such authority when he cut the grass. While he was at work on the land he was notified that he had not acquired a right to the grass. He at once desisted from cutting more, but finished making and stacking that already cut. The question we are called upon to determine is whether, under the facts of the case, the title to the hay vested in defendant. It is shown that the value of the grass before it was cut was small; some of the evidence tending to show that it was but eight to ten cents an acre. Each acre yielded from a ton and a half of hay, which was worth in stack from two to three dollars per ton. Under these facts, we

Lewis v. Courtright.

think it would be manifestly unjust to hold that the ownership by the plaintiff of the grass gave him title to the hay. It is true the hay in stack is the grass which belonged to plaintiff, cut and cured, and preserved for use; but the labor of defendant, rendered in good faith, under a claim of right, gave to the hay substantially all its value. The grass was worth to plaintiff the price for which it would sell. Time and the forces of nature would not add materially to that value, but on the contrary, would in a short time have destroyed it, had the grass remained untouched. Therefore the plaintiff should not be permitted to enjoy the fruits of defendant's labor without paying therefor. *Wetherbee v. Green*, 22 Mich. 311; *Murphy v. Railway Co.*, 55 Iowa, 474; *Lampton's Ex'rs v. Preston's Ex'rs*, 19 Amer. Dec. 104. The plaintiff seeks to recover, not the value of the grass taken by defendant, but the hay which he has made, and, under the facts disclosed by the record, must fail.

II. Other questions discussed by counsel are answered by the conclusions already announced, or are immaterial, or without proper foundation in the record, and therefore need not be further considered. We discover no error in the record prejudicial to plaintiff. The judgment of the district court is

AFFIRMED.

THE STATE V. SALTS.

1. **Grand Jury: INDICTMENT BY VOTE OF FOUR: CONSTITUTIONALITY.** Pursuant to an amendment to the constitution adopted in 1884, providing that "the grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide," the Twenty-first General Assembly (chap. 42) provided that in counties having a population of sixteen thousand, or less, the grand jury shall be composed of five members, and, in counties having a larger population, of seven members; also that when the grand jury is composed of five members, an indictment may be found by the concurrence of four, and when composed of seven members, by a concurrence of five. *Held* that this last provision was not unconstitutional on the ground that it authorized an indictment to be found by less than the smallest number of which the grand jury could be composed, which was not allowable under the common law and the constitution before the adoption of said amendment. (Compare *State v. Ostrander*, 18 Iowa, 435.)
2. **Indictment: STATING PLACE OF CRIME.** While it is the better practice to allege the venue by express averments in the body of the indictment, it is still sufficient, under section 4305 of the Code, if by reference to the caption it is made clearly to appear that the offense was committed within the jurisdiction of the court. (See opinion for illustration.)
3. **Liquor Nuisance: BY REGISTERED PHARMACIST HOLDING PERMIT: CODE, SECTION 1540.** In section 1540 of the Code, providing that "if any person not holding *such* permit * * * sell * * * any intoxicating liquor," etc., the permit referred to is that provided for in the preceding sections, viz., a permit granted by the board of supervisors for the sale of intoxicating liquors for certain enumerated purposes, and not to the permit of a registered pharmacist to sell for the actual necessities of medicine only, granted under chapter 83, Laws, 1886. Hence sales by a registered pharmacist for any other purpose than the actual necessities of medicine are as certainly forbidden and made punishable by section 1540 as are sales by persons having no authority to sell for any purpose; and the keeping of a place where such sales are made is prohibited and declared a nuisance by section 1548. (*State v. Douglas*, 73 Iowa, 279, distinguished.)

Appeal from Adams District Court.—HON. JOHN W.
HARVEY. Judge.

FILED, SEPTEMBER 6, 1888.

DEFENDANT was convicted of the crime of nuisance, and the court pronounced judgment against him, imposing a fine, and from that judgment he appeals.

H. T. Dale, for appellant.

A. J. Baker, Attorney General, and *Burg. Browne*, County Attorney, for the State.

REED, J.—I. The indictment was found after the taking effect of chapter 42, Laws Twenty-first General Assembly. Adams county having a population of less than sixteen thousand, the grand jury therein, under the provisions of the act, is composed of five members, and the grand jury which found this indictment was composed of that number. Defendant demurred to the indictment, alleging that the statute under which the grand jury was organized is in conflict with section 11, article 1, of the constitution. The particular provision of the article which it is claimed the act infringes is the following: "And no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in the army or navy, or in the militia when in actual service in time of war or public danger." Before the taking effect of the act the grand jury was composed of fifteen members; that number being prescribed by the statutes then in force. But, before the adoption of the amendments to the constitution, which were adopted by the people of the state at the general election in 1884, it could not have been constituted with less than twelve members; for at common law a grand jury must consist of that or some greater number, not exceeding twenty-three, and it is to a tribunal thus constituted that the provisions of the constitution then in force referred when they spoke of a grand jury. The words, "a grand jury," as they

1. GRAND jury:
indictment by
vote of four:
constitution-
ality.

occurred in those provisions, were used in the sense and with the meaning given them by the common law. It was also a rule of the common law that, when a grand jury consisted of but twelve members, an indictment could not be found without the concurrence of all of the members; and, when composed of a greater number, that number at least must concur; and this rule requiring the concurrence of twelve grand jurors, before an indictment could be found, was preserved by our statutes. The amendment to the constitution, adopted in 1884, provides that "the grand jury may consist of any number of members, not less than five nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer without the intervention of a grand jury." The act in question provides that, "in counties having a population of sixteen thousand inhabitants or less, the grand jury shall be composed of five members; and, in counties having a population of more than sixteen thousand inhabitants, it shall consist of seven members. It is this latter provision which it is claimed is in violation of the provision of the bill of rights quoted above (section 11, article 1). The argument is that the inherent principle of the common law is that an indictment can only be found by the concurrence of at least the smallest number of which the grand jury can consist, and that this principle was necessarily included in the constitution when the system was adopted, and is neither abolished nor modified by the amendment; and hence, as the constitution now fixes five as the smallest number of which the tribunal can consist, the provision that an indictment may be found upon the concurrence of four jurors is in conflict with it. If counsel's premises should be conceded, his conclusion would follow logically and necessarily. But we think the premises are not sound.

The reason of the rule that at least twelve grand jurors must concur in the finding of an indictment is not in the fact that that was the smallest number of which the tribunal could be composed. If that were

true, it would have followed that, if the general assembly, as it might have done, had designated thirteen or fourteen as the smallest number of which the grand jury should consist, all must have concurred. For the amendment of 1884 is a limitation only as to the maximum and minimum numbers that may be adopted, and it empowers the general assembly to adopt any number within the limits prescribed; and, when any number within those limits is prescribed by statute, it at once becomes the smallest number of which the body can be composed. But, further than this, it would have been competent for the general assembly, before the amendment, to fix any number between eleven and twenty-four as the smallest number of which the grand jury should be composed; for the rule, which by implication became a part of the constitution, fixed only the maximum and minimum numbers, and left with the general assembly the power to adopt any number within those limits. Now, if the argument is sound, it would have followed, if that course had been pursued, that all the members of the body must have concurred in the finding of an indictment; for the number prescribed would have been the smallest of which it could legally be composed. But the reason of the rule had relation to the number twelve, and not to the fact that that was the smallest number of which the grand jury could be composed. Under the common law, no man could be subjected to punishment for crime until twelve of his neighbors and peers had concurred in an accusation against him, and a like number had by their verdict pronounced him guilty upon that accusation, and the rule is but the expression of that principle. But it is modified by the amendment of 1884. The rule that the accusation must be concurred in by twelve men is swept away, and it may be made by a grand jury of such number, within the prescribed limits, as the general assembly may designate, or the party may be held to answer without the intervention of a grand jury. The idea that there must be unanimity in the presentment in

The State v. Salts.

any case is nowhere expressed in the constitution ; and the rule which formerly required such unanimity, when the grand jury was composed of but twelve members, having been swept away, it cannot be ingrafted upon the instrument by implication or construction, but the whole subject of the manner of the presentment is left to the general assembly. But little light is thrown upon the subject by the adjudicated cases. Our conclusion, however, is supported by the reasoning in *State v. Ostrander*, 18 Iowa, 435.

II. Another objection alleged by the demurrer is, the indictment does not allege that the offense was committed within the jurisdiction of the court.

2. INDICTMENT:
stating place
of crime.

The caption of the indictment is as follows:
“The grand jury of the county of Adams, in the name and by the authority,” etc., “accuse A. J. Salts of the crime of keeping a nuisance, committed as follows.” This is followed by a statement of the facts constituting the offense. It is alleged that on the first of March, 1887, in the county aforesaid, the defendant did “then and there own, keep, control, use and manage,” etc. ; but the place at which the offense was committed is not otherwise designated. It is provided by section 4305 of the Code that “the indictment is sufficient, if it can be understood therefrom (1) * * * (2) * * * (3) that the offense was committed within the jurisdiction of the court, or is triable therein ; (4) * * * (5) * * * (6) * * *.” The words, “did there and then own,” etc., as used in the indictment, have reference to the time and place before spoken of. From these words, and what precedes them, it can be understood that the offense was committed in Adams county, at the time designated. While it would certainly be better practice to allege the venue by express averments in the body of the indictment than by reference to the caption, under the provision quoted, the indictment cannot be held bad because of such omission.

III. The indictment is under section 1543 of the Code. It was admitted on the trial that defendant was

3. LIQUOR
nuisance : by
registered
pharmacist
holding per-
mit : Code,
sec. 1540.

a registered pharmacist during the time covered by the indictment. The jury, however, were warranted by the evidence in finding that, during that time, he had made many sales of intoxicating liquors to persons who were in the habit of becoming intoxicated. Also that he made some sales that were unlawful for other reasons. The court instructed the jury that, under his permit, he was authorized to sell intoxicating liquors for the legitimate necessities of medicine, but for no other purpose. Also that he was required by the statute to reject all applications for such liquors which he had reason to believe were not made in good faith ; and that, if he made such sales to persons who intended to use the liquors purchased as a beverage, and he had good reason at the time to believe that such were the intentions of the purchaser, the sales were unlawful. The court also gave the following instruction : “ Before you can find the defendant guilty, you must be satisfied, from the evidence, that in the county of Adams and state of Iowa, and subsequent to the fourth day of July, 1886, and prior to the finding of the indictment, he kept, used or occupied the building mentioned in the indictment, and that he kept for sale or sold therein intoxicating liquors, in violation of law, in manner as alleged in the indictment.” The objection urged against this instruction is that under it the jury were warranted in convicting the defendant upon proof merely that he had made sales of intoxicating liquors in his place of business for unlawful purposes. Counsel’s position is that, while a registered pharmacist may commit the crime of nuisance by keeping intoxicating liquors in his pharmacy or place of business with intent to sell the same for unlawful purposes, the mere act of selling unlawfully does not give to the place the character of a nuisance. The argument in support of that position is based upon the phraseology of the statute. Section 1543 provides that, “ in cases of the violation of the provisions of the three preceding sections, or of section

The State v. Salts.

1525 of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, * * * is carried on, is hereby declared a nuisance; * * * and whoever shall erect, or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly. * * *

There was no evidence which tended to show that defendant had violated the provisions of either section 1525 or section 1541. Section 1542 forbids the keeping of intoxicating liquors by any person with intent to sell the same contrary to the provisions of the statute, and prescribes the punishment which shall be imposed for violations of that provision. Section 1540 prohibits the sale of such liquors by any person not holding the permit provided for by the preceding sections. The argument is that as, by its terms, section 1543 prohibits the keeping of places in which the business forbidden by the other sections is carried on, it has no relation to acts or persons not contemplated by those sections; and, consequently, as section 1540 only forbids and prescribes the punishment for sales of liquors by persons not holding permits, such sales, by persons holding permits, do not render the places in which they are made nuisances, even though the sales are for unlawful purposes.

The soundness of this argument may be admitted, and yet the result sought by counsel would not follow. The language of section 1540 is: "If any person not holding such permit, by himself, his clerk, servant or agent," etc. The permit there referred to is that provided for in the preceding sections of the same chapter, viz., a permit granted by the board of supervisors for the sale of intoxicating liquors for certain enumerated purposes. Now, defendant did not hold a permit of that character. Nor did he acquire the right to make sales of liquors for any purpose under the provisions of that chapter. But the right to make such sales, for the "necessities of medicine," was conferred upon the class

to which he belongs by a statute subsequently enacted (chapter 83, Laws, 1886). That statute creates an exception in the case of registered pharmacists, in that it authorizes them to sell intoxicating liquors for medicine without having obtained a permit from the board of supervisors, but forbids them absolutely to make sales for any other purpose. Hence sales by them for any other purpose are as certainly forbidden, and made punishable, by section 1540, as are sales by persons having no authority to sell for any purpose; and the keeping of a place where such sales are made is prohibited by section 1543. In *State v. Douglas*, 73 Iowa, 279, we held that a person holding a permit from the board of supervisors, for the sale of intoxicating liquors, could not be punished for the act of selling in violation of his permit. That conclusion was based solely upon the phraseology of section 1540. The case does not support counsel's position.

Exception was taken to several rulings of the court on the admissibility of evidence offered by the state. The questions are not regarded of special importance, and we deem it sufficient to say that the rulings appear to us to be correct. We have not found in the record any grounds for disturbing the judgment.

AFFIRMED.

SUPPLEMENTAL OPINION ON REHEARING.

[FILED, FEBRUARY 9, 1889.]

REED, C. J.—After the foregoing opinion was filed, defendant filed a petition for rehearing, in which our attention was called to an apparent inaccuracy of statement in the third paragraph of the opinion. It is there stated that the right to sell intoxicating liquors as a medicine was conferred upon registered pharmacists by chapter 83, Acts, 1886, and that they were not required to obtain permits before engaging in the business. The language of the opinion is capable, perhaps, of a broader meaning than was intended. What was meant is that they were not required to obtain permits under the statutes formerly in force, and which continued in force as

Hall v. Jackson.

to all applicants for permission to sell intoxicating liquors for other purposes than as a medicine. But they are required by the express provisions of the enactment of 1886 to obtain permits from the board of supervisors before engaging in the business. This, however, does not detract from the argument of the opinion; for if it be conceded that the construction of section 1540 of the Code contended for by counsel is correct, and that it exempts persons holding the permits there referred to from the penalties prescribed by section 1543 for keeping or maintaining a place where intoxicating liquors are sold or kept for sale contrary to law, it does not aid defendant, for he does not belong to the class exempted. He does not hold the permit there referred to, but the one held by him is of a different character, and was issued under a different statute; and, if he sells for any other purpose than as a medicine, his case is covered by the general provision of section 1543. As to such sales, he is in the same condition as one holding no permit at all. The petition for rehearing will therefore be

OVERRULED.

HALL V. JACKSON.

Forcible Detainer: TRIAL OF TITLE: WHAT IS NOT. In an action of forcible detainer, where defendant had taken possession under a lease which had expired, he set up as a defense that he continued to hold possession under a written contract with plaintiff for the purchase of the land, with the terms of which he had complied on his part. *Held* that this was a concession that the title was in plaintiff, and did not raise an issue as to the title, but only as to the right of possession, and was not therefore forbidden by section 3620 of the Code. (Compare *Oleson v. Hendrickson*, 12 Iowa, 222, and *Jordan v. Walker*, 52 Iowa, 647.)

Appeal from Mills District Court.—HON. GEORGE CARSON, Judge.

FILED, FEBRUARY 9, 1889.

THIS is an action of forcible detainer, which was originally brought before a justice of the peace, where there was a trial by jury, and a verdict and judgment

Hall v. Jackson.

for defendant. The plaintiff appealed to the district court, where a trial was had without a jury, and a like judgment was rendered. Plaintiff appeals.

E. B. Woodruff, John Y. Stone, and P. P. Kelly,
for appellant.

Watkins & Williams, for appellee.

ROTHROCK, J.—On the twenty-first day of December, 1886, the plaintiff, by a written contract signed by the parties, leased to the defendant a quarter section of land for one year. At the same time the parties entered into another written contract, by which the defendant had the right to purchase the land at the expiration of the lease, upon certain terms named in the contract. By the last-named contract the defendant was required to make his election to purchase the land on the twenty-first day of December, 1887; that being the date of the expiration of the lease. The election was to be made by executing a writing in which the terms of the sale should be complied with. At the expiration of the lease the defendant caused the contract of purchase to be prepared, and there is evidence in the case tending to show that late in the evening of the twenty-first of December he tendered to the plaintiff a compliance with the contract of purchase. It is true the evidence upon the question as to the defendant's election to purchase the land is in conflict, but it is sufficient to sustain the judgment of this court. The contention of the plaintiff is that the defense based upon a contract of purchase cannot be interposed in an action of forcible detainer, because it is provided by section 3620 of the Code that the question of title cannot be investigated in the action. But we think it is quite plain that the defendant did not seek to try titles with the plaintiff. He conceded that the title to that land was in plaintiff. His claim was that he was entitled to the possession of the land, because the plaintiff had contracted to sell it to him. That such a defense is proper, in an action of this kind, see *Oleson v. Hendrickson*, 12 Iowa, 222, and *Jordan v. Walker* 52 Iowa, 647.

AFFIRMED.

ROMANS V. MADDUX *et al.*

1. **Fraudulent Conveyance : HUSBAND TO WIFE : CONSIDERATION : EVIDENCE.** A husband may discharge a *bona-fide* indebtedness to his wife by a conveyance of property to her, and neither prior nor subsequent creditors can question the transaction. (*Jones v. Brandt*, 59 Iowa, 332.) But such a transaction cannot be sustained without satisfactory evidence that actual contractual relations existed between the husband and wife with reference to her separate money or property, and the evidence on that point in this case is indefinite, confused and contradictory ; and, upon consideration of the whole case, *held* that the property remained in equity in the husband, and was subject to his debts.
2. ——— : VOID AS TO SUBSEQUENT CREDITORS. A conveyance not made in good faith and for a good consideration is voidable as to subsequent as well as to existing creditors. (See cases cited in opinion.)

Appeal from Boone District Court. — HON. J. L. STEVENS, Judge.

FILED, MARCH 7, 1889.

THIS is an action in equity, by which the plaintiff, who is a judgment creditor of the defendant Thomas A. Maddux, seeks to subject certain real estate, the legal title to which is in the defendant Ezra T. Maddux, to the payment of plaintiff's judgments. There was a hearing upon the merits, and a decree for the plaintiff. Defendants appeal.

E. L. Greene, for appellants.

Crooks & Jordan and *Shaw & Kuehnle*, for appellee.

ROTHROCK, J.—I. In the year 1869 the defendant Thomas A. Maddux was the owner of the land in controversy. He held the legal title to the greater part of it, and had purchased the remainder, but had not then acquired a deed for the same. There was a mortgage

1. FRAUDULENT conveyance: husband to wife: consideration: evidence.

77	203
88	568
77	203
94	303
94	563
77	203
96	33
97	665
98	386
101	262
77	203
106	652
77	203
1109	486
77	203
1141	249

upon that part of the land to which he held the legal title. An action for the foreclosure of the mortgage was pending, and on the eighteenth day of September, 1869, three days before the decree of foreclosure was entered, Thomas A. Maddux conveyed the land to Elizabeth Maddux, his wife, by a deed with covenants of general warranty, excepting as to said mortgage. Elizabeth Maddux died intestate in March, 1870, leaving several children, the oldest of whom was the defendant Ezra T. Maddux, who was then about twenty years of age. In April, 1871, Thomas A. Maddux conveyed an undivided one-third interest in the land to one Gamble by a deed of general warranty. In 1873, Gamble made a quitclaim deed of his interest in the land to the defendant Ezra T. Maddux. In 1884, Thomas A. Maddux and the surviving children of Elizabeth Maddux, except E. T. Maddux, by a quitclaim deed, transferred all of their interest in the land to Ezra T. Maddux. By these several conveyances and transfers the complete legal title of the land is held by Ezra T. Maddux.

It is claimed by the plaintiff that all of these conveyances and transfers were without consideration, fraudulent and void as to the creditors of Thomas A. Maddux, and that the title held by Ezra T. Maddux is a secret trust, and that as to said creditors the land is the property of Thomas A. Maddux, and should be subjected to the payment of his debts. On the other hand, the defendants contend that the conveyances were made in good faith, and for valuable considerations, and are really what they purport to be. There is possibly this exception to this claim, which is that the quitclaim deed made to Ezra T. Maddux by the other children of Elizabeth Maddux, deceased, was without consideration, but was made in good faith, to enable Ezra T. Maddux to adjust and extinguish certain tax claims upon the land, or to procure a loan of money thereon. It is conceded that Thomas A. Maddux is insolvent. It appears from the evidence that after the death of Elizabeth Maddux the defendant Thomas A. Maddux, and all of his children, remained in Boone county, and in possession

Romans v. Maddux.

of the land, upon which there was a large amount of timber. They had a saw-mill, and cut and sawed the timber from the land, and sold lumber, railroad ties, wood, etc. In 1873 the family removed to Crawford county, and rented a large farm, and farmed quite extensively. Thomas A. Maddux appeared to be the ruling spirit in this enterprise. He took the active management of affairs, and did the purchasing for the family, and accounts were run with merchants in his name. The claims upon which the plaintiff's judgments are founded arose by the purchase of agricultural implements, cultivators, plows, wagons, lumber and general hardware for use upon the farm in Crawford county. Thomas A. Maddux made the contracts for the property, and gave his obligations therefor. The purchases were made in 1874 and 1875, and soon thereafter were put in judgment, and execution was levied upon personal property on the farm. Ezra T. Maddux made claim to the property levied upon, and a trial of the right of property was had, which resulted in judgment against the plaintiff herein. In that suit a wagon, which the plaintiff had sold to Thomas A. Maddux, was claimed by Ezra T. Maddux, and it was awarded to him. When payment was demanded for the property purchased, Ezra T. Maddux claimed to own all the personal property. He claims in his testimony in this case that, when he went to Crawford county, he took with him, as his own property, "nine head of horses and mules, eight cows, three two-horse wagons and harness."

We recite these facts in connection with the origination of these judgments, not as directly affecting the title to the land in controversy, but as showing the general method pursued by the defendants in the prosecution of their business. It would seem that they ought to have paid the debts made necessary by the purchase of implements and machinery with which to carry on their business; and their conduct in this regard tends in some degree to show that their transactions and claims, with reference to the property of the family, have

not been characterized by that fairness which honest dealing demanded.

But we recur to the matter of the land in Boone county. After farming a few years in Crawford county, Thomas A. Maddux, with all of his family excepting Ezra T. Maddux, removed to the territory of New Mexico. Ezra T. Maddux remained in Crawford county until about the year 1885, when he removed to the state of Nebraska. Before removing, he sold a farm which he owned to H. C. Laub. In this transaction he paid a judgment which Laub held against Thomas A. Maddux for goods purchased to carry on the Crawford county farming operations, above referred to. Soon after his removal to Nebraska, Thomas A. Maddux returned from New Mexico and took possession of the land in controversy, built a dwelling house upon it, and now resides thereon. It is claimed by the defendants that the conveyance from Thomas A. Maddux to Elizabeth Maddux was founded upon a valuable consideration, which consisted of money paid to him which she owned in her own right, and which she acquired from the estates of her father and of her mother. The account given of this separate estate by Thomas A. Maddux is not at all satisfactory. It is indefinite in time, place and circumstance, and his testimony in regard thereto is confused and absolutely contradictory. Besides, he made the conveyance of the land to his wife three days before the decree of foreclosure, and after he had sustained large losses in some business enterprises. It is correct, and this court has frequently held, that a husband may discharge a *bona-fide* indebtedness to his wife by a conveyance of property to her, and neither prior nor subsequent creditors can question the transaction. *Jones v. Brandt*, 59 Iowa, 332, and other cases. But such a transaction cannot be sustained without satisfactory evidence that actual contractual relations existed between the husband and wife with reference to her separate money or property. And then the subsequent acts and declarations of Thomas A. Maddux with reference to the land in controversy are inconsistent with

Romans v. Maddux.

the claim that the conveyance of the property to his wife was a good-faith transaction. He repeatedly claimed the land as his own. He brought actions in his own name for alleged trespasses upon it, and did other acts wholly inconsistent with any other claim than that the conveyance was a mere transfer to avoid the payment of his debts. It is strenuously contended that these acts and declarations are incompetent evidence. It is true, the grantor of real estate cannot be heard to slander and impeach the title which he has undertaken to convey. But his conduct in reference to the land is a most important fact, as impeaching his testimony, so far as it pertains to the good faith and honesty of the transaction. But the evidence impeaching the claim now made by Ezra T. Maddux is not limited to the acts and declarations of his father. It is shown, by evidence which we regard as clear and convincing, that when Ezra T. Maddux sold his Crawford county farm to Laub he stated that the land now in controversy belonged to his father, and was put in his (Ezra's) name to prevent creditors from getting a lien upon it, and that, in the event of his father's death, it was to be divided equally among the children; that his father was the real owner of the land. Besides this, the claim that Ezra T. Maddux was the owner of nearly all the personal property in use upon the farm rented in Crawford county is not at all credible. He was then a very young man, but little past majority, and that he should have accumulated so much in so short a time is not to be credited without more satisfactory evidence than has been offered in this case. A careful perusal of all the evidence in the case leads us to the conclusion that Thomas A. Maddux is the real owner of the land in controversy. There are many facts and circumstances in evidence aside from those above recited which point to this conclusion. It is to be understood that we do not detail all the evidence in an equity case tried in this court upon the facts. Counsel for appellants appear to rely with confidence on the case of *Caffal v. Hale*, 49 Iowa, 53. It is claimed that the evidence of fraud in that case is

The State v. Kennedy.

stronger and more convincing than in this, and that this court refused to find that the transaction was fraudulent. It is scarcely necessary to say that the controlling facts in the two cases are not alike. Indeed, in cases of this kind, regard can be had only to general rules, because, in the very nature of things the facts cannot be the same, either in substance or in detail.

II. It will be observed that the plaintiff was not a creditor of Thomas A. Maddux when the said Maddux made the conveyance of the land to his wife.

2. —: void as to subsequent creditors.

Plaintiff is a subsequent creditor. But, as we view the facts of this case, this is not a material consideration. If it is made to appear that the conveyance was not in good faith, and for a good consideration, it is voidable as to subsequent as well as to existing creditors. *Harrison v. Kramer*, 3 Iowa, 543; *Lyman v. Cessford*, 15 Iowa, 229; 1 Story, Eq. Jur., secs. 353, 356. In our opinion, the decree of the district court should be

AFFIRMED.

77	208
80	84
77	208
92	214
92	543
77	208
1132	662

THE STATE V. KENNEDY.

1. **Criminal Law: CHANGE OF VENUE: DISCRETION OF COURT.**
After a jury had found defendant guilty of murder in the first degree, the verdict was set aside on the ground that one of the jurors was an alien. Defendant then moved for a change of venue because of the alleged prejudice of the people of the county. The motion was supported by the affidavits of defendant and seven others, none of whom were shown to be disinterested, and by thirty-three extracts from newspapers published in the county, but such of these as were calculated to excite prejudice against defendant were published prior to the first trial. The allegation of prejudice was controverted by forty-four counter-affidavits on the part of the state. *Held* that the court did not abuse its discretion by overruling the motion. (See Code, sec. 4374, and *State v. Perigo*, 70 Iowa, 660.)

The State v. Kennedy.

2. ——— : ——— : ORAL EXAMINATION OF AFFIANTS. Where defendant had moved for a change of venue, and the state had filed counter-affidavits, a motion by defendant to have the affiants on the part of the state brought into court and orally examined, on the alleged grounds that such persons had made up their minds, and expressed their opinion that defendant was guilty, and that their affidavits were false, and that they would so appear upon such oral examination, was properly overruled, where there was nothing in the record, aside from the statements made as the ground of the motion, to indicate that the counter-affidavits were not made in good faith.
8. ——— SELECTION OF JURORS: OBJECTION: APPEAL. Defendant in this court claims that the trial court erred in refusing him a new trial on the ground that the names of jurors summoned by special *venires* were not written on separate ballots and mixed and drawn from a box, as required by law, but were read from the lists in the hands of the sheriff. The truth of this claim is not shown by the record, and there is nothing to support it except the affidavit of defendant's attorney attached to the motion for a new trial. *Held* not sufficient to overcome the presumption that the jurors were drawn in the manner required by law.
4. ——— : NEW TRIAL: INTOXICATION OF JUROR. A person accused of crime is not required to abide the decision of a drunken juror, but the mere drinking of intoxicating liquors by a juror during an adjournment of court will not authorize the setting aside of a verdict of guilty. (See *State v. Livingston*, 64 Iowa, 560: *State v. Bruce*, 48 Iowa, 536.) The evidence as to the alleged drunkenness of a juror in this case (see opinion) is so unsatisfactory that it
 - cannot be said that the court erred in refusing a new trial on that ground.
5. ——— : MURDER: CIRCUMSTANTIAL EVIDENCE. Defendant was convicted of the murder of his wife. The evidence (see opinion) was wholly circumstantial, but plainly showed that the crime had been committed, and tended to show that defendant was the perpetrator of it. *Held* that the verdict of the jury, rendered under proper instructions, finding the defendant guilty, could not be interfered with by this court on the ground that it was not supported by sufficient evidence.

Appeal from Dubuque District Court.—HON. JOHN J. NEY, Judge.

FILED, FEBRUARY 12, 1889.

The defendant was indicted and tried for the crime of murder in the first degree. The jury found him

VOL. 77—14

guilty as charged, and determined that he should be punished with death. He was sentenced to be hanged on the first day of March, 1889, and appeals.

McNulty & Barnes, for appellant.

Alphons Mathews and *John Y. Stone*, Attorney General, for the State.

ROBINSON, J.—On the twenty-sixth day of April, 1887, the dead body of Mary Kennedy, the wife of defendant, was found in a meadow about half a mile from his home, in Dubuque county. Eleven wounds were found upon her face and scalp, and there were bruises on her arms, left hand and scalp and face. The most severe injury was a wound which commenced in front of the right ear, and extended thence under the skin to a point about the middle of the right eyebrow. From a point between the extremities of that wound, near the eye, another wound extended under the skin and under the eye to the nose, where it came out. This double wound appeared to have been made by a chisel, or some similar instrument, which seems to have been partially withdrawn after the first wound was made and again pressed forward and inward, making the second wound. This was of uniform width. The external wound near the ear, and also the one near the nose, were about one and one-half inches in width. Of the other wounds several were severe and incised. One appeared as though it might have been made by a boot-heel. The temporal and other arteries were severed, and death resulted from hemorrhage and the shock caused by the injuries. No fracture of the skull or extremities was found. There were indications of a severe struggle near where the body was found. Portions of the body were exposed, and the clothing was disarranged, as though rape had been attempted, but there were no indications that it had been accomplished. The defendant was arrested, and indicted for the murder of his wife. He was tried for the offense at the September term, 1887, of the

Dubuque district court. The jury returned a verdict of guilty on the twenty-fourth day of September, 1887, and determined that he should be punished with death. That verdict was set aside, and a new trial was awarded to defendant on the ground, as stated by his counsel, that one of the jurors was an alien. On the thirty-first day of October, 1887, the defendant filed a motion for a change of the place of trial to Delaware county, on the grounds that he had been once tried in Dubuque county, and that the inhabitants of that county were so prejudiced against him that he could not obtain a fair trial therein. The motion was overruled, and the second trial was had at the January term, 1888, of the Dubuque district court, and resulted as already stated.

I. Counsel for appellant insist that the court erred in overruling the motion for a change of venue. The

1. CRIMINAL
law : change
of venue : dis-
cretion of
court.

motion was supported by the affidavits of defendant and seven others, to the effect that a fair trial in Dubuque county could not be had by defendant by reason of excitement and prejudice against him. It was also supported by thirty-three extracts from newspapers published in Dubuque, and circulated in Dubuque county, and reference was made in it to the record of the case, showing the facts in regard to the summoning and empan-eling of the first jury. The fact that the defendant had been once tried and convicted in Dubuque county was not, of itself, sufficient to justify a change of venue. None of the witnesses who verify the applications of defendant were shown to be disinterested. Of the newspaper extracts, seventeen were published within two weeks of the discovery of the murder. Among those are the only ones—five or six in number—which contain statements calculated to arouse excitement or prejudice against defendant. The others contain recitals of proceedings before the coroner's jury, before the justice on the preliminary hearing, and in court. As a rule, they are free from passion and from reflections on defendant. We must assume, in the absence of a showing to the contrary, that defendant was advised of the newspaper

The State v. Kennedy.

articles published in April and May, 1887, before his first trial was commenced, and that he did not then think that excitement or prejudice which would interfere with his having a fair and impartial trial existed. The newspaper articles which were subsequently published were not of a character to inflame the public. The forty-four counter-affidavits filed on behalf of the state tend to show that whatever excitement or prejudice there had been in regard to the murder existed soon after it was committed, and that it died out before the trial was commenced in September. The fact that a special *venire* had been issued, on the suggestion of the state, for one hundred persons qualified to act as jurors, did not show excitement or prejudice against the defendant, but rather a desire to secure a fair trial. Applications for changes of venue in criminal cases are to be decided by the trial court in the exercise of a sound discretion. Code, sec. 4374; *State v. Perigo*, 70 Iowa, 660. We discover nothing in the record which tends in any manner to show that there was an abuse of such discretion in this case.

II. After the state had filed its exceptions to the petition for a change of venue and its counter-affidavits, the defendant filed a motion asking that the persons who had executed the counter-affidavits be brought into court for oral examination, on the alleged grounds that such persons had made up their minds and expressed their judgment that defendant was guilty, and, in substance, that the counter-affidavits were false, and that an oral examination of the affiants would show that fact, and would sustain the petition for a change of venue. The motion was overruled, and, so far as we can discover, the ruling was correct. There is nothing in the record, aside from the statements made as the ground of the motion, to indicate that the counter-affidavits were not made in good faith, nor to show any intent to mislead or deceive the court.

III. On the thirteenth day of January, 1888, a special *venire* for seventy-five persons qualified to act

The State v. Kennedy.

3. — : selection of jurors : objection : appeal as jurors was issued to the sheriff of Dubuque county, and on the seventeenth day of the same month a second special *venire* for twenty-five persons so qualified was issued. The defendant alleges as one ground of his motion for a new trial that the names of those persons who were required to appear by virtue of the special *venires* were not written on separate ballots, and mixed and drawn from a box, as required by law. This ground of the motion is supported by the affidavit of an attorney for the defendant, in which it is stated that the names of the extra jurors were not drawn from a box, but were read from the several lists in the hands of the sheriff. The transcript of the record shows that defendant objected to the filling of the panel from the men summoned by virtue of the special *venires* on the ground that such *venires* were improperly issued, but fails to show that the jurors were selected as claimed by defendant. The facts in regard to the empaneling of the jury should have been made a part of the record by a bill of exceptions. We are of the opinion that it is not competent to overcome the presumption which must be indulged in favor of the proceedings in the trial court, in regard to matters which occurred in the presence of the court, by means of an affidavit attached to the motion for a new trial. The rulings and other proceedings in the court below must be presumed to have been correct, until a competent showing to the contrary is made. We must therefore presume that the jury in this case was properly empaneled.

IV. Another ground of the motion for a new trial is alleged misconduct on the part of a juror named Freeman. One Lucas states under oath that a person he afterwards ascertained to be Freeman went into his saloon on Locust street, during the trial, and on the twenty-fourth day of January, 1888; that Freeman there stated that he was a juror in the Kennedy case; that the evidence was nearly all in, and clearly showed that defendant killed his wife; that a Dubuque jury ought to have nerve

4. — : new trial : intoxication of juror.

The State v. Kennedy.

enough to hang Kennedy, and that the jury would be "damned cowards" if they didn't hang him. Lucas further stated that Freeman remained in his saloon from twenty to thirty minutes; that he was not perceptibly drunk, but drank in his saloon. An attorney for defendant states under oath that at two o'clock in the afternoon of January 24, 1888, Freeman came into the court-room "in a condition of beastly drunkenness;" and that in consequence of his condition the court was adjourned until the next morning. The affidavit of Freeman was filed on behalf of the state, and he was examined orally on the application of defendant. The state also filed the affidavit of nine of the remaining eleven jurors, and of the attorney for the state, and also a second affidavit of Lucas. In that affidavit Lucas states, in substance, that he was not present during the trial, and did not know any of the jurors; that he does not know Freeman, and does not know that he ever saw him; that he does not know whether the man referred to in his first affidavit was a juror or not; that during the trial the case was talked about by men in his saloon, but he paid but little attention to the conversation; but when an evening paper stated that one of the jurors was drunk his attention was called to what was said in the saloon in the forenoon, and that he knows nothing further about the man who was talking having been a juror. A third affidavit of Lucas was filed by defendant, in which he states that he did pay especial attention to what the man who claimed to be a juror said, and that he was called Freeman. In view of the contradictions in the Lucas affidavits, and in view of the further fact that Freeman swears that he does not know where the saloon of Lucas is, but does know that he was not in any saloon on Locust street on the day in question, but little weight can be given to what Lucas says. From the various affidavits and other matters of record we learn that the jury was empaneled on the seventeenth day of January, 1888; that the cause was being tried from that time until the next Saturday; that on that day court adjourned until the forenoon of the next

The State v. Kennedy.

Monday; that the jury met at that time, but further proceedings were postponed, on account of the sickness of an attorney for defendant, until two o'clock in the afternoon of Tuesday the twenty-fourth day of January; that Freeman had been subject to attacks of a heart trouble for many years; that on the night of Monday, the twenty-third of January, he suffered an attack of the kind named, and was unable to sleep; that he was sick and unable to eat his breakfast, Tuesday morning; that between ten o'clock that morning and noon he drank "a big glass" of whiskey, and "two ponies" of whiskey,—a "pony" of whiskey being, as stated by counsel for defendant, a "half-price drink." Freeman remained somewhat under the influence of the liquors he had drunk until three o'clock of Tuesday afternoon. He drank no other liquor during the trial excepting a glass of beer during the first week. He and nine other members of the jury unite in stating that he was not intoxicated, nor under the influence of intoxicating liquor to any extent whatever, during any of the sessions of court while the trial was being had. It is urged by counsel for defendant that while Freeman may have been "physically sober" when the trial was resumed on Wednesday, yet his mind may have been, and probably was, still to some extent under the influence of the liquor he drank the day before. But, although the condition suggested by counsel was possible, there is nothing in the record which tends to show that it did in fact exist; while there is much which tends to show that it did not. In addition to the affidavits of jurors, we have the presumption which must necessarily be indulged in favor of the action of the court. The condition of the juror at two o'clock in the afternoon of Tuesday was specially called to the attention of the court, and steps were taken to prevent a repetition. It is fair to presume that the condition of the juror was noticed by the court when the trial was resumed on Wednesday, and that it was then satisfactory. It would indeed be an intolerable wrong to compel a person accused of crime to abide the decision of a drunken

The State v. Kennedy.

juror, but it does not appear that defendant has suffered that wrong. The case is not different in principle from several in which this court has held that the drinking of intoxicating liquors by a juror during an adjournment of court would not authorize the setting aside of the verdict. *State v. Livingston*, 64 Iowa, 560; *State v. Bruce*, 48 Iowa, 536, and cases therein cited. We therefore conclude that the ground of the motion under consideration was not well taken.

V. There is no direct evidence of the guilt of the defendant of the crime of which he was convicted. The evidence relied upon by the state is circumstantial. It appears that the defendant and the murdered woman had been married twenty-two years at the time of her death. At that time they were living upon a farm a few miles northwest of Dubuque, which had been their home for nineteen years. They had five children, of whom John, aged sixteen years, was the eldest; Susie was thirteen years of age; James was ten; Charlie was seven; and Frank was five. They were engaged in supplying milk for the Dubuque market, and kept a number of cows, and much, if not most, of the work was done by Mrs. Kennedy. She owned the cows, while her husband owned the farm. For some time prior to the date of the murder, Kennedy and his wife led turbulent lives. Each was in the habit of drinking intoxicating liquors to excess, and both seem to have been quarrelsome when under the influence of liquor. On several occasions Kennedy struck or otherwise maltreated his wife. He frequently drove her from the house, and compelled her to remain out of doors among the neighboring hills all night. On one occasion he threw her down, dragged her by the hair, and placed his foot upon her neck. John was present, and tried to release his mother, but was unable to do so until he severed from her head the hair which was within his father's grasp. A few months before her death Mrs. Kennedy absented herself from home for several days. On the twenty-third day of April, 1887, she returned

5. — : murder:
circumstantial
evidence.

The State v. Kennedy.

from Dubuque, where she had been with milk, and was met by her husband. He accused her of driving the horses too fast, and cursed her. She went into the house, and busied herself for a time with some sewing, while he unharnessed the horses, and then did the milking. While he was so engaged she left the house with a cream can, saying that she was going to Habbercorn's for sugar. Habbercorn kept a store and saloon about two miles from Kennedy's in a northwesterly direction. Mrs. Kennedy arrived there between seven and eight o'clock in the evening, purchased some sugar and whiskey, and had the latter put into the can. She drank some beer, and left between ten and eleven o'clock. From the fact that the sugar was afterwards found in an outbuilding near her home, and the can was found on the sill of a hay-barn, also near her home, and near a depression in the hay, it is surmised that Mrs. Kennedy returned to her home on Saturday night without entering it, and that she spent the night in the barn. She returned to Habbercorn's about nine o'clock Sunday morning, and procured beer and whiskey. She left there between twelve and one o'clock, saying that she must hurry home. She was last seen alive about one o'clock, walking or running on a road which led in a northeasterly direction along the Maquoketa river. This road left the direct road to Kennedy's, and continued in a southeasterly direction to a point a little more than half a mile northeast of Kennedy's, where it turned in a northeasterly direction. Other roads continued that east and northeast to the Peru road, which led to Dubuque. When Mrs. Kennedy was last seen, she was going in the direction of the point in the river road above mentioned, and was within less than a mile of it. Two days later her body was found a few hundred feet southwest of that point, and nearly on a line from it to her home. When Kennedy finished milking, Saturday night, he left home, saying he was going to Roab's and to Billmeyer's saloons to look for Mrs. Kennedy, and that if he found her he should kill her. Roab's was some two miles in a southeasterly direction, and

The State v. Kennedy.

Billmeyer's was beyond Habbercorn's in an opposite direction. It is uncertain whether Kennedy knew, when he left home, where his wife had gone, and it is not probable that he saw her that night. The next morning he went to Dubuque, and on the way talked with one Burton in regard to his wife, and complained that she controlled the money. He returned home about two o'clock in the afternoon, under the influence of liquor, and cross. He left home about four o'clock in the afternoon, saying that he was going over to Scharf's, where John was at work, to collect his wages, and if he found his wife he should kill her. Scharf kept a saloon something over two miles east and half a mile south of Kennedy's, on the Peru road. Kennedy arrived there after four o'clock, and remained until after six. While there he drank whiskey several times. He left between six and seven o'clock, going northwest on the Peru road, and was seen to pass some houses a short distance from Scharf's. He was not seen between seven and nine o'clock, and was next seen at his home by his son James. It was about three miles by the roads, from the point on the Peru road where he was last seen, to the bend in the river road already mentioned, and about two miles across the fields. He claims to have left the Peru road soon after he was last seen in it, and to have returned through the fields to a railway crossing southeast of his home, from which he could see persons on both the railroad and wagon road from Dubuque; that he remained there for some time, watching for his wife; and that he went from there home. If this claim be true, it is not probable that Kennedy committed the murder; but the claim is not corroborated. On the contrary, some of the established facts tend to contradict it. At about nine o'clock Sunday evening Mary Lea heard a woman scream twice in the direction in which Mrs. Kennedy's body was afterwards found. She had known Mrs. Kennedy ever since she could remember; knew her voice; had heard her scream before, and recognized her voice in the screams. The first scream was loud; the second was as long as the first, but not so loud. The

The State v. Kennedy.

place where the murder was committed was not quite half a mile from Kennedy's house. He reached home between nine and ten o'clock. When he entered the house James was sitting up, and saw blood on his father's face. Kennedy asked for a towel, but before James could get one he wiped his face and hands on a tick which hung over a pole in the kitchen. He and James went out to milk, and while there he asked James if he could get along without his mother, and then said he guessed they could. During the afternoon of Tuesday one Fallhopper found the body of Mrs. Kennedy. He did not recognize it, and did not know that she was missing. In notifying the people of that vicinity of what he had found, he informed Kennedy, but did not describe the body, nor the clothing. Kennedy made no answer to Fallhopper, and did not go to the body, but went three-fourths of a mile in the opposite direction, to a mine, where Burton was at work. He then told Burton and one Coffin that there was a body found up by the river, and from the description of the shawl he thought it was his wife. A day or two after the finding of the body, defendant was arrested, and his clothes worn the night of the murder were taken from him. Blood-stains were found on his stockings and the wristbands of his shirt, and what seemed to be similar stains were found on his pantaloons. The tick on which his son had seen him wipe his face was found to be stained with blood. At the time of the murder a carpenter named Fanning lived at Kennedy's, and kept in the pantry an unlocked box containing tools. On the Monday preceding the murder Fanning left tools at Kennedy's, and, among them, an inch chisel and another. At about four o'clock of the next Sunday, *i. e.*, the day of the murder, he looked for the inch chisel, but did not find it. Some time during the next week he found the handle of the inch chisel, but did not find the blade. At that time he also missed another chisel-blade. Other facts, which are not of sufficient importance to enumerate, but which tend to sustain the theory of the state, were also proven. Counsel for defendant place

The State v. Kennedy.

much stress upon the fact that the state failed to show where Mrs. Kennedy was from one o'clock to nine of Sunday afternoon, and that it has failed to show that defendant knew where she was during that time. But the time and place of the murder were shown, and it is also shown that Kennedy could have committed the crime. If the evidence for the state was reliable, there is room for little, if any, doubt as to the guilt of defendant. It was the province of the jury to determine the value and weight of the evidence. They have said by their verdict that it proves the guilt of defendant beyond a reasonable doubt, and we do not feel authorized to say that the verdict is so unsupported by the evidence as to justify us in setting it aside.

VI. The record discloses numerous objections made by defendant to the introduction of evidence, and numerous exceptions to rulings of the court, including the refusing to give certain instructions, and the giving of others. We have examined all rulings of which complaint is made with the care which the importance of this case demands. Very few of the rulings are discussed by counsel. It is sufficient for us to say that we discover no error of a nature to prejudice the defendant. He seems to have had a fair and impartial trial. The charge of the court to the jury was quite favorable to him, and fairly submitted the theory of the defense. We conclude that the judgment of the district court cannot be disturbed. It is therefore

AFFIRMED.

THE KEOKUK AND NORTHWESTERN RAILWAY COMPANY
v. DONNELL *et al.*

1. **Injunction: OF AD QUOD DAMNUM PROCEEDING: ADEQUATE REMEDY AT LAW.** Defendants began an *ad quod damnum* proceeding against plaintiff to recover the value of certain land occupied in the construction of plaintiff's road. Plaintiff in this action sought to enjoin defendants from prosecuting that action on the grounds that defendants had conveyed the right of way to another company, and that plaintiff had become possessed of that company's right through the foreclosure of a mechanic's lien; that plaintiff had paid defendants for the right of way; that defendants' right to sue for the value of the land was barred by the statute of limitations; and that they were estopped by the judgment in the mechanic's lien case, and by their own acts, from prosecuting that suit. *Held* that all questions raised by these issues, as well as the question whether the right of way had been lost by abandonment, could be raised and tried in the *ad quod damnum* proceeding, which is an adequate remedy at law, and that, therefore, equity had no jurisdiction to grant the injunction.
2. **Appeal: PRACTICE: QUESTION OF EQUITABLE JURISDICTION.** Upon the appeal to this court of an equity case, in the absence of any objection based upon the want of equitable jurisdiction by reason of the fact that there is a plain, adequate and complete remedy at law, this court will raise the objection of its own motion, and dismiss the petition.
3. **Former Adjudication: DISMISSAL FOR WANT OF JURISDICTION.** Decrees and judgments estop the parties thereto only when based on the merits of the case. Consequently, though there has been a decree against the plaintiff on the merits in an equity case in the district court, but upon appeal to this court the petition is dismissed on the ground that equity has no jurisdiction, the dismissal will be without prejudice to plaintiff's rights to recover on the same cause in an action at law.

Appeal from Lee District Court.—HON. J. M. CASEY,
Judge.

FILED, MAY 8, 1889.

ACTION in chancery to restrain defendants from prosecuting an *ad quod damnum* proceeding to recover

77	221
85	457
77	221
88	91
77	221
88	319
77	221
91	20
77	221
96	123
77	221
106	631

 Keokuk & N. W. Ry. Co. v. Donnell.

the value of certain land occupied in the construction of plaintiff's railroad. Defendants answered the petition, setting up matters in defense, and asking that the plaintiff's petition be dismissed. After a trial upon the merits a decree was entered, in effect declaring that plaintiff had no right, title, interest, easement or right of way upon the land involved in the action, and that defendant Donnell is the absolute owner thereof in fee simple, which is not subject to an easement or right of way for plaintiff's railroad, and that plaintiff's petition be dismissed. From this decree plaintiff appeals.

D. F. Miller, Sr., and P. Trimble, for appellant.

Anderson & Davis, for appellees.

BECK, J.—I. The defendant W. A. Donnell instituted *ad quod damnum* proceedings to recover damages for the occupation of the right of way by plaintiff's railroad of certain lands owned by him. A jury was empaneled by the sheriff to assess defendant's damages in the manner prescribed by the statute. Thereupon plaintiff brought this action to enjoin and restrain the *ad quod damnum* proceedings, on the ground that they are wrongful and unauthorized by law, and, if judgment be had thereon, it would be a cloud upon plaintiff's title to the right of way, and it has no adequate remedy at law. Plaintiff bases its claim to the right of way over defendant's lands, or the right to occupy them for the purposes of its railroad, upon the following facts: "In 1869 defendant Donnell and his wife united in a deed to the Keokuk & Minnesota Railway Company, conveying a part of the land in question in this suit for the right of way of a railroad to be built by that company. A writing upon the face of the deed declares that it is not to be called for until the road is built and running through the land." All the right of this railroad company to the lands was sold to a trustee under a judgment obtained on a proceeding to foreclose a

1. INJUNCTION:
of *ad quod*
damnum pro-
ceeding:
adequate
remedy at
law.

mechanic's lien, and the trustee afterwards conveyed the right of way to plaintiff, which, in 1880, entered upon the land, and, with the knowledge and consent of defendant Donnell, constructed its railroad. It is alleged in the petition that plaintiff paid defendant the damages assessed by arbitrators for the occupation of this part of the lands by the railroad. In an amended petition it is alleged that, as plaintiff's *ad quod damnum* proceeding was not commenced within five years after the lands were first occupied, they are barred by the statute of limitations; and it is further alleged in this pleading that plaintiff caused the right of way held by the other railroad company to be condemned, and under such proceedings acquired it. It is also alleged that the enforcement of any agreement to pay defendant damages on account of the occupation of the lands by the railway company is barred by the statute of limitations. Defendants, in an amended answer, allege that the right of way which plaintiff claims to have acquired under the other company was by it abandoned, and it retained no rights thereto. It is shown by defendant's answer that, in the proceedings sought to be enjoined in this case, defendant's damages for the occupation of his lands by the railroad were assessed at the sum of \$2,234, and plaintiff appealed from such assessment to the district court. Defendants also allege in their answer that there is no equity in plaintiff's petition. An amended abstract filed by appellee, which is not denied, and must therefore be taken as admitted, shows that the defendants were not parties to the proceeding to enforce a mechanic's lien, under which plaintiff claims to have acquired the right of way.

II. In our opinion, plaintiff has a plain, complete and adequate remedy at law against the threatened assessment of damages, if it be illegal or unauthorized by law for any of the causes and reasons set up and alleged in its petition. If defendant conveyed the right of way to the other railroad company, and the plaintiff by the mechanic's lien proceedings acquired

that right of way, which had not been abandoned, but conferred the right upon plaintiff to the occupancy of the land, these matters could have been pleaded and established as a defense to the *ad quod damnum* proceedings commenced by defendant. They present simple questions of title to the right of way,—plaintiff claiming that it owns the right of way; defendants insisting that they have never parted with that right. Issues involving these facts and defenses, if established in plaintiff's favor, would defeat defendants' *ad quod damnum* proceeding. All question as to the effect of the judgment in the mechanic's lien proceedings, and in fact all other questions involved in the issue as to the ownership of the right of way, could be properly considered and determined in the *ad quod damnum* proceedings. The same remarks may be made as to the questions involving the abandonment of the right of way, the statute of limitations and, indeed, as to all questions which pertain to the ownership of the right of way or rights to the occupancy thereof. See 1 High, Inj. [2 Ed.] secs. 629-644; Mills, Em. Dom., secs. 160, 161; *Central Iowa Ry. Co. v. Railway Co.*, 57 Iowa, 249.

III. Plaintiff insists that defendants are estopped to deny its right to the occupancy of the right of way. But the doctrine and rules in estoppel are not alone recognized and enforced in a case in chancery. They may be pleaded and established to support actions at law or defenses thereto. If defendant entered into any contract, received any sum as damages, or did any act recognizing plaintiff's right to the occupancy of the land, these matters may be shown in the *ad quod damnum* proceedings to defeat him of recovery. An action at law may be defeated by showing that plaintiff has recognized by his acts or admitted by his declarations that his own claim is not well founded, or that defendant is in fact the owner of the property involved in the suit which plaintiff seeks to recover. That is just this case. Defendant claims in the *ad quod damnum* proceeding to recover the value of the land occupied by the right of way. Plaintiff insists that it is the owner of the

right of way, and that defendant has in law, by his acts and declarations, admitted its ownership. The issues thus formed may be tried at law in the *ad quod damnum* proceedings. Plaintiff, therefore, has a plain, adequate and certain remedy in that action. If all the issues which are decisive of the case are triable in the *ad quod damnum* proceedings, plaintiff has a plain, adequate, and complete remedy in the courts of law, and must pursue it, instead of appealing for relief to the court of chancery. The issues involved in the cause of action of plaintiff, and the defenses thereto, being cognizable at law, ought to be tried according to the rules and practice prevailing in the law courts. These familiar elementary doctrines do not demand in their support the citation of authorities.

From these considerations it appears that the district court, sitting in equity, had no jurisdiction of this case.

2. APPEAL:
practice:
question of
equitable
jurisdiction.

This objection was raised by the allegations of the answers, to the effect that there was no equity in plaintiff's petition. But in the absence of any pleading raising the objection based upon the want of jurisdiction by reason of the fact that there is a plain, adequate and complete remedy at law, or the absence of objection in any form based upon this fact, this court will itself, *sua sponte*, raise the objection. Story, Eq. Pl., sec. 481.

The petition of plaintiff will be dismissed. But as the decision is not based upon the merits of the case, and

3. FORMER adju-
dication: dis-
missal for
want of
jurisdiction.

the rights of the parties are in no way determined by this decision, it will not affect the right of plaintiff to resist at law the claim of defendants to compensation for the appropriation of their lands for the uses of plaintiff's railroad. Decrees in chancery and judgments at law only estop the parties thereto when based upon the consideration of the merits of the case. The dismissal of a case because the court in which it is pending has not jurisdiction thereof cannot defeat recovery upon the same cause of action, when a suit is brought in a

 Ridley v. Doughty.

forum possessing jurisdiction to try it. We will not be expected to cite books to support this elementary doctrine. The decree of the court below, in effect, cuts off all right of the plaintiff to resist defendants' claim to damages. It was probably based upon the merits of the case, which are not determined by us. The decree dismissing plaintiff's petition, which will be entered in this court, will be without prejudice to plaintiff to make defense to the *ad quod damnum* proceedings instituted by defendants.

AFFIRMED.

RIDLEY *et al.* v. DOUGHTY.

Taxation: REDUCTION OF ASSESSMENT BY SUPERVISORS: DUTY OF AUDITOR: REMEDY OF TAX-PAYER: MANDAMUS. Where the board of supervisors, acting as a board of equalization, directs that the assessed value of realty in a certain town be reduced a certain per cent., and the county auditor fails and refuses, upon demand, to enter the property in said town in the tax-lists at the reduced and equalized assessment, owners of real estate in the town, who have not yet paid their taxes, may proceed against the auditor by *mandamus* to compel him to comply with the law in that regard. (See Code, secs. 832, 836, 837.) He has no discretion in the matter, and the tax-payers are not deprived of the remedy by *mandamus* on the ground that they have an adequate remedy at law or by injunction; for those remedies would not afford the relief sought, and to which they are entitled, to-wit, the correction of the tax-list.

Appeal from Emmet District Court. — HON. LOT THOMAS, Judge.

FILED, MAY 8, 1889.

ACTION of *mandamus* to compel defendant to make certain corrections in the tax-list. Demurrer to the petition. Demurrer sustained, and plaintiffs appeal.

77	226
85	419
77	226
119	364

Ridley v. Doughty.

Soper & Allen, for appellants.

J. G. Myerly, for appellee.

GIVEN, C. J.—I. The petition shows that the defendant is auditor of Emmet county, and that the plaintiffs each own severally certain real estate in the incorporated town of Estherville in said county; that said real estate was regularly assessed for the year 1887, and that at their general meeting the board of supervisors, in equalizing the assessments of said county, duly directed that the assessed values of realty within said town be decreased forty-four per cent.; that the defendant, disregarding said equalization, made up the tax-lists for 1887 by placing said property therein at the valuation placed by the assessor, instead of said decreased valuation; that August 7, 1888, the plaintiffs demanded in writing of the defendant that he correct said tax-list by reducing the valuation of their said real estate forty-four per cent., which he refused to do, wherefore they ask a peremptory writ of *mandamus* commanding the defendant to make said correction. The defendant demurs on the grounds that it appears by the petition that the plaintiffs have a plain, speedy and adequate remedy in the ordinary course of law, and that the act sought to be enforced is discretionary with the defendant. It is claimed that the petition fails to show that the taxes have not been fully paid, and that, unless this appear, the plaintiff's remedy is by suit to recover for taxes illegally or erroneously assessed and collected. The action is not to recover a money judgment, but to compel a correction of the tax-list. Reading the petition in the light of the wrong complained of, and the relief asked, we think it fairly appears that the taxes have not been paid. It is claimed that if the taxes have not been paid the plaintiffs have an ample remedy by injunction. Injunction would not afford the relief demanded, to-wit, the correction of the tax-list. The plaintiffs have not a "plain, speedy and adequate remedy in the ordinary course of the law," for the correction of the tax-list.

Ridley v. Doughty.

II. Section 832, Code, authorizing equalization by the county board, provides that it shall be "substantially as the state board equalize assessments among the several counties of the state." Section 836 provides: "The county auditor shall add to or deduct from the valuation of each parcel of real property in his county the required percentage;" and section 837, that in transcribing the assessments he shall enter the "number of town lots and value." Taking these provisions together, it is clear that it is the duty of the auditor to enter in the tax-list the valuation upon which the tax is estimated and collected. This is an imperative duty, about which the auditor has no discretion, and if he has erroneously entered the wrong valuation, the authority to correct it is given him in section 841 of the Code. The district court erred in sustaining the demurrer, and the ruling is reversed, and the case remanded.

REVERSED.

McMAHON V. THE TRAVELERS' INSURANCE COMPANY.

Insurance: AGAINST ACCIDENT: NON-PAYMENT OF PREMIUM INSTALLMENTS: FORFEITURE: NOTICE: WAIVER. M. was an employe of a railroad company, and he procured of the defendant an accident insurance policy payable to his wife, the plaintiff. The policy insured him for four consecutive periods of two, two, three and five months, respectively, from April 21, 1887, and to pay the premiums he gave to defendant an order on the railroad company for the payment of five dollars out of his wages for each of the months of May, June, July and August, 1887, and it was expressly provided in the contract that each of the four payments was to be applied only to its corresponding insurance period, and that "all claims for injuries effected during any period for which its respective premium has not been actually paid shall be forfeited to the company." The railroad company received the order and placed it on file as a voucher, and paid the five dollars out of M.'s wages for the month of May, but it never formally accepted the order. The defendant, on or before June 21, demanded of the railroad company the five dollars for that month, but payment was refused on the ground that M. was no longer in that company's employment; but he was in fact in its employment, though on another division, and he drew all of his earnings for the month of June; and on the twenty-ninth of that month he wrote to the defendant to cancel his policy, as he did not wish to carry it longer. Defendant did not, however, cancel the policy nor return the order to M. On the eighteenth of July following M. was killed by an accident, and plaintiff drew all the wages due him. *Held—*

- 1) That the order on the railroad company did not amount to a payment of the premium, and that M. was insured only for the first period of two months, for which the premium was actually paid; which time expired prior to his death.
- (2) That since M. had directed the cancellation of the policy, and drew all his wages for the month of June, it is evident that he intended to terminate it, and considered it no longer in force, and that he had actual notice that the payment of the premium for June had not been made. Hence the plaintiff has no ground to complain that defendant did not notify him of the railroad company's failure to make the second payment.

McMahon v. The Travelers' Ins. Co.

- (8) That defendant's right to claim a forfeiture was not waived by its failure to cancel the policy and return the order ; for, had the cancellation been waived, and M. lived, and the third payment been made, the policy would have been in force, by its terms, during the third period, regardless of its condition during the second.

Appeal from Des Moines District Court. — HON.
CHARLES H. PHELPS, Judge.

FILED, MAY 8, 1889.

ACTION to recover an amount alleged to be due on a policy of insurance issued by defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Power & Huston, for appellant.

Dodge & Dodge and *A. H. Slutsman*, for appellee.

ROBINSON, J.—On the twenty-first day of April, 1887, the defendant issued the policy in suit. The portions of that policy important for consideration on this appeal are as follows: "The Travelers' Insurance Company of Hartford, Conn., in consideration of the warranties in the application for this policy, and of an order (for moneys therein specified) on Chicago, Burlington and Quincy Railroad Company, does hereby insure (subject to conditions on back hereof, not waivable by agents) John McMahon, stone-mason, for the period or periods specified below, beginning at noon of the day this policy is dated, * * * against loss by travel, * * * resulting from bodily injuries effected during the term of this insurance, through external, violent and accidental means, which shall, independent of all other causes, immediately or wholly disable him from transacting any and every kind of business pertaining to the occupation under which he is insured ; or, if death shall result from such injuries alone, within ninety days, will pay two thousand dollars to Maggie McMahon, wife.

“Express Agreement. The payments specified in the order are premiums for consecutive periods of two, two, three and five months, and each shall apply only to its corresponding insurance period. All claims for injuries effected during any period for which its respective premium has not been actually paid shall be forfeited to the company. * * *”

The order referred to in the policy was delivered to defendant, and is as follows :

“April 21, 1887.

“Chicago, Burlington and Quincy Railroad Company :

“Pay to the Travelers' Insurance Company of Hartford, Connecticut, or its authorized agent, the following sums out of my wages for the months specified : (1) Five dollars for May, 1887 ; (2) five dollars for June, 1887 ; (3) five dollars for July, 1887 ; (4) five dollars for August, 1887. These sums are premiums on an accident policy, issued to me by the said company, bearing the same date and number as this order. If the agreements and conditions of said policy are complied with, the first payment makes said policy good for two months, the second for four months, the third for seven months, and the fourth for twelve months, respectively, from said date.

“[Signature]

JOHN McMAHON.”

The order was sent to the railroad company on the twenty-first day of May, 1887, with a statement called a deduction list, showing the amount owing by McMahon from his wages for May, and also the sums due from other employes of the company to defendant. The first payment of five dollars was received by defendant from the railroad company on the eleventh day of June, 1887. The order was never formally accepted by the last-named company, but was retained by it as a voucher. On or before June 21, 1887, defendant sent to the railroad company a deduction list for that month, which showed the sum of five dollars to be due from the wages of McMahon. This was returned to defendant, with the statement that McMahon was not employed by the railroad company. No further attempt was made by

McMahon v. The Travelers' Ins. Co.

defendant to collect the sum due from McMahon, and nothing but the first payment of five dollars was ever made on the order or for the policy. The policy was not canceled by defendant, nor was the order returned to McMahon. It appears that McMahon was in fact employed by the railroad company during the month of June, although on a different division from that on which he was at work prior to May 23. He drew all of his earnings for the month of June. On the twenty-ninth day of that month McMahon wrote to the general agent of defendant, as follows: "I have left John Smith's gang. You will please cancel my accident policy, as I don't care to keep it any longer."

On the eighteenth day of July following he was run over by the cars of a railway train, and died within a few minutes from the injuries received. After his death, the plaintiff drew from the railroad company all wages due him. It is claimed by plaintiff that the policy was in force at the date of McMahon's death, and that defendant is liable therefor to the amount of the policy. Defendant denies liability, and insists that the policy was not in force by reason of non-payment of the second installment due by the terms of the order. It also contends that certain conditions of the policy were violated by deceased, and that in consequence of such violations he lost his life.

I. It is conceded that the policy in suit was in force from the twenty-first day of April to the twenty-first day of June, 1887, that being the first of the four consecutive periods provided for in the policy. There is little or no controversy as to the facts material to this appeal, but the parties do not agree as to the effect which should be given them. It is insisted by appellee that the order which formed a part of the consideration of the policy was, in effect, both an order and an assignment of parts of the wages of McMahon; that there was an implied undertaking on his part to earn wages in the service of the railroad company to meet the payments when due, and that he performed his obligation fully, and made complete payment when he earned the required amount

of money. But the appellant contends that the policy contains, in effect, four contracts of insurance, corresponding to the number of payments provided for in the order, and that actual payment of money was required before the contract on which it was applied would become effectual. It is evident to us that the claims of appellee cannot be maintained. The policy expressly provides that the payments specified in the order are premiums for the four consecutive periods named; that each payment should apply only to its corresponding insurance period; and that "all claims for injuries effected during any period for which its respective premium has not been actually paid shall be forfeited to the company." This clearly provides that there shall be no recovery on the policy for injuries which are received during any insurance period for which the premium had not been "actually paid." The earning of the money would be of no value to defendant, unless the money in some manner inured to its benefit. But in this case, by the terms of the order, the money for the second insurance period could be paid by the railroad company from the June earnings alone. The railroad company never obligated itself to make that payment. It not only did not make it, but made it impossible to do so by paying all the June earnings to McMahon. The alleged accident upon which this action is founded occurred during the second insurance period provided for by the policy, and under the undisputed facts of the case there can be no recovery therefor, unless defendant has failed to discharge some duty incumbent upon it, or has waived its defense. Our attention has been called to the case of *Lyon v. Insurance Co.*, 55 Mich. 141; 20 N. W. Rep. 829, as announcing a different conclusion from similar facts. The decision in that case seems to be based in part upon facts not fully disclosed by the record, and especially upon an assignment of the wages "in writing, and independent of the order given on the railway company for the amount." Hence it does not appear that the decision is necessarily in conflict with our conclusion in

McMahon v. The Travelers' Ins. Co.

this case. McMahon himself treated the policy as at an end. Defendant made no attempt to collect premiums after it received McMahon's letter of June 29. It is said that at the time of his death the railroad company owed him an amount more than sufficient to make the payment for the second insurance period. That is true; but the amount then due was for wages earned in July, and by the terms of the order could have been used only for the third payment. Moreover, it was collected by plaintiff, and retained by her. She demands, in effect, that money collected and appropriated by McMahon and herself be treated as constructively paid to defendant for the purpose of giving life to the policy which McMahon had treated as terminated. We know of no rule of law which would sanction so inequitable a proceeding. *Bane v. Insurance Co.*, 85 Ky. 677; 4 S. W. Rep. 787.

II. It is said that it was the duty of defendant to notify McMahon of the failure of the railroad company to make the second payment. It is not shown when defendant learned of that failure, but it appears that McMahon drew all his wages for the month of June at the time the railroad company usually paid such wages. He therefore had actual notice that the second payment was not made, and could not have been prejudiced by the failure of defendant to give him notice of the fact. It further appears that he had directed the cancellation of the policy less than three weeks before, and his acceptance of all his earnings for June was evidence that he intended to terminate it, and considered it of no further force.

III. Appellee insists that, if defendant might at any time have claimed a forfeiture, the right to do so was waived by its failure to cancel the policy, and by its failure to return the order. Neither of these things was required of defendant in order to preserve its right to insist that it is not liable in this action. The policy provides that it may be in force during some of the insurance periods, and not during others. Had McMahon lived, and had his cancellation been waived, and

Hippee v. Pond.

had the third payment been made, the policy would have been in force during the third period, without regard to its condition during the second.

IV. Violations of conditions of the policy in regard to intoxication, violating law, and the rules of a corporation operating the road on which McMahon met his death, and voluntary exposure to unnecessary danger, are discussed by counsel; but, since the conclusion we have reached seems to rest upon undisputed facts, and to be decisive of the case on its merits, we find it unnecessary to determine the other questions presented.

REVERSED.

HIPPEE V. POND *et al.*

77	235
85	550

77	235
111	175

1. **Agency: PAYMENT OF NOTE TO ABSCONDING AGENT: WHOSE LOSS.** P. procured C., as her agent to negotiate a loan of H., which was secured by a mortgage on land. P. paid installments of interest to C., and afterwards sold the land to J., who did the same,—he having assumed the mortgage,—and C. forwarded the interest to H. When the loan was due J. applied to C. to procure an extension of the loan for two years, and paid C. for his services. H., however, was unwilling to grant an extension. Afterwards, believing that J. was ready to pay the loan, C. paid the amount of the note with his own money, and procured a satisfaction piece, which was never recorded, but afterwards found that J. was not ready to pay, and still wanted an extension. C. then had the note and mortgage assigned in blank and sent to him, and he sold them, after due, to plaintiff, who paid full value therefor, and inserted his name in the blank assignments. J. did not know of this transfer, but supposed that H. still held the securities. At the end of the two years J. paid the amount of the loan to C., who failed to pay it to plaintiff, but absconded. *Held* that plaintiff succeeded to all the rights of H.; that the payment to C. was not a satisfaction of the note and mortgage; and that plaintiff was entitled to foreclose it as against J. and subsequent mortgagees of the land. [Compare *Artley v. Morrison*, 73 Iowa, 132.]
2. **Guardian and Ward: ASSIGNMENT OF NOTE AFTER WARD'S MAJORITY.** An assignment by a guardian, executed after his ward's majority, of a note made to the guardian for money due the ward, is valid, in an action by the assignee to collect the note, in the absence of any objection by the ward.

Hippee v. Pond.

Appeal from Clay District Court.—HON. GEORGE H. CARR, Judge.

FILED, MAY 8, 1889.

ACTION for the foreclosure of a mortgage upon certain real estate. Upon a hearing on the merits there was a decree for the defendants. Plaintiff appeals.

N. B. Raymond, for appellant.

W. S. Bemis and *Hughes & Chamberlain*, for appellees.

ROTHROCK, J.—I. In the year 1878 the defendant Mary J. Pond was the owner of eighty acres of land in Clay county. She made a loan of two hundred dollars of one S. I. Hillhouse, guardian of Sarah B. Hillhouse, of Hartford, Connecticut. The loan was for five years, and was secured by a mortgage on said land. Afterwards Mary J. Pond sold and conveyed the land to the defendant Jones, who assumed the payment of said mortgage. The loan was originally procured through one Creighton, a loan broker at Des Moines. There is no doubt that Creighton was the agent of Mrs. Pond in effecting the loan. The regular payments of interest on the loan were sent by her and by Jones, after he bought the land, to Creighton, who forwarded the money to Hartford. The note secured by the mortgage fell due on May 1, 1883. Some time prior to that date Jones applied to Creighton to procure for him an extension of the loan for two years. Creighton agreed to procure the extension upon the payment of six dollars for his services. On the twenty-sixth of April, 1883, he wrote to one Abbe, of Hartford, Connecticut, through whom the loan had been negotiated, inquiring whether the desired extension would be granted. Abbe replied that Mrs. Hillhouse was a poor woman, and wanted her money. This letter was

1. AGENCY: payment of note to absconding agent: whose loss.

Hippee v. Pond.

written on the eighth day of May, 1883. On the seventh of the same month, Creighton again wrote to Abbe, inclosing a draft in payment of the note and mortgage, and saying: "We enclose sat. piece for Pond loan." The money was received, and the satisfaction piece was executed, and returned to Creighton. On the seventeenth day of May, 1883, Creighton returned the note and mortgage to Abbe, requesting that he have Mrs. Hillhouse assign them in blank, which she did, and the same were returned to Creighton. It does not appear what became of the satisfaction piece. Jones paid the six dollars commission for the extension of time desired by him. Creighton sold the note and mortgage to the plaintiff, who paid therefor the full amount of the principal and accrued interest. He took the note and mortgage into his possession, and at some time thereafter inserted his name in the blank assignments. Jones continued to send the semi-annual installments of interest to Creighton, who paid the same to the plaintiff, and at the expiration of the two years he paid the full amount of the note and mortgage to Creighton, who absconded without paying the plaintiff any part of the money,

The question to be determined is, should the plaintiff suffer the loss occasioned by Creighton's defalcation, or should the loss fall upon Jones, and the other defendants who are subsequent mortgagees and purchasers of the land? If, when the note and mortgage became due, Jones had, instead of asking for an extension, paid the money to Creighton, and Creighton had failed to pay it to Abbe, the agent of the mortgagee, the loss would have fallen upon Jones. *Artley v. Morrison*, 73 Iowa, 132. Did the facts, in connection with the payment of the mortgage by Creighton, the subsequent sale and assignment to the plaintiff, change the rights of Jones as to whom he was authorized to make payments? It is contended by counsel for appellant that, as the plaintiff held the note and mortgage by a regular assignment, he has the same rights which the mortgagee had. On the other hand, it is claimed by counsel for appellees that

Hippee v. Pond.

when Creighton paid the mortgage, and received the satisfaction piece, the mortgage was extinguished, and that the assignment conferred no right upon the plaintiff. We do not think this last position can be maintained. Jones did not pay the debt at that time. He was not entitled to a discharge of the debt, and a satisfaction of the mortgage, without payment. At the time Creighton made the payment for him, so far as the evidence shows, it was done by mistake, and in the belief that Jones was ready to pay the debt. Creighton stated in the letter in which he sent the money to Abbe that "Pond wanted an extension, but since decided to pay." It appears that at that time Creighton was a man of affairs. He was extensively engaged as a loan agent or broker. He advanced his own money to pay this loan, and if he did so by mistake, or in the belief that Jones was ready to reimburse him for the advancement, he had the right to correct the mistake by taking an assignment of the note and mortgage. We are of opinion that the assignment to the plaintiff was a valid transaction, and that he was the lawful holder of the note, and of the mortgage given to secure its payment.

The transaction, so far as Creighton's connection with it was involved, amounted to a mere transfer of the note and mortgage from Mrs. Hillhouse to the plaintiff, and his rights as against the maker of the mortgage and subsequent grantees of the land were precisely the same as the rights of Mrs. Hillhouse, unless there were some facts in connection with the assignment to the plaintiff which changed the relations of the parties. An examination of the evidence satisfies us that in making the transfer and assignment the plaintiff acted in good faith, and in the belief that Creighton was the agent of the mortgagors. The plaintiff testified as a witness that Creighton represented himself to be their agent, and there is no evidence in the record contradictory to this. It is true that Creighton solicited the plaintiff to make the purchase and take the assignment, and promised that he would find another purchaser for the note

Hawley v. Page.

and mortgage. But the fact is undisputed that the plaintiff paid for the same in full, and his ownership thereof is and was absolute. It is also a significant fact that none of the defendants in any manner changed their relations to Creighton. They at all times supposed that the mortgage was still held by Mrs. Hillhouse. In view of all these facts and circumstances there is no difference in principle between this case and that of *Artley v. Morrison*, above cited.

II. A question is made as to the validity of the assignment of the note and mortgage made by Mrs. Hillhouse. It appears that at that time her ward, Sarah B. Hillhouse, was of full age, and it is claimed by counsel that the right of the guardian to act as such had ceased. But, in the absence of any objection from the ward, the collection of her money by the person to whom it was payable cannot be called in question by third persons. The note was made payable to S. I. Hillhouse, and her assignment must in this proceeding be regarded as valid. Our conclusion is that the district court should have entered a decree for the plaintiff as prayed.

REVERSED.

HAWLEY V. PAGE *et al.*

Statute of Limitations: FRAUDULENT CONVEYANCE: CONSTRUCTIVE NOTICE OF. An action to set aside a fraudulent conveyance is barred in five years after the fraud is discovered, and it will be presumed to be discovered when the fraudulent conveyance is filed for record, unless the plaintiff shows that the knowledge with which he is charged by the filing of the deed was unavailable as a basis for further inquiry leading to the discovery of the fraud. (*Laird v. Kilbourne*, 70 Iowa, 88, explained and followed.)

Appeal from Humboldt District Court.—HON. LOT THOMAS, Judge.

FILED, MAY 8, 1889.

77	239
92	428
77	239
93	41
77	239
95	763
77	239
96	618
77	239
107	318
77	239
108	254
77	239
136	537

ACTION to subject certain real estate to the payment of a judgment. Decree for defendants, and plaintiff appeals.

Theo. Hawley, for appellant.

Wright & Farrell, for appellees.

GRANGER, J.—On the sixth day of August, 1873, the defendant George E. Page, who was, and is now, the husband of the defendant Phœbe E. Page, owned the premises in question, and on that day the plaintiff obtained a judgment in the district court of Humboldt county against said George E. Page. On the tenth day of April, 1874, George E. Page conveyed the premises to his wife, by deed, and for a consideration therein expressed of five hundred dollars, which deed was filed for record March 28, 1876. Plaintiff avers that such conveyance to the wife was in fraud of his rights as a judgment creditor, and that his judgment should be decreed a lien thereon. This action was commenced in July, 1884, and the defendants say the action is barred by the statute of limitation. No brief or argument is on file for appellees. Upon the question of the plea of the statute of limitations appellant concedes that if the case of *Laird v. Kilbourne*, 70 Iowa, 83, is in point, it is conclusive of this case, and he says that under the rule there laid down the defendants have established their plea. With reference to that case, it may be well here to remark that the language of the opinion, construed abstractly, announces a rule broader than the court intends. As applied to the facts of that case, the rule is correct. Viewed in the light of the plea under consideration, we think the facts of the two cases are not essentially different. In that case there was a debt against the husband, after which he transferred the premises to his wife. It may be added that in that case the husband, at the time of the conveyance, was insolvent. The deed was duly recorded, of which the plaintiff Laird was required to take notice. At the time of

Hawley v. Page.

the deed being placed on record he knew that he was a creditor. These are the exact facts in the case at bar. The plaintiff, in legal contemplation, knew of the recording of the deed by which his judgment debtor conveyed his lands to his wife. The record further discloses that the deed was not recorded for nearly two years after its execution. These facts are urged as indications or badges of fraud, which we may admit. They were known to the plaintiff, and we think they constitute knowledge or a discovery of fraud within the meaning of the law. The law certainly does not contemplate such a discovery as would give positive knowledge of a fraud, but such a discovery as would lead a prudent man to inquiry or action. To hold that the discovery must amount to absolute knowledge of the fact of fraud would be to render the statute practically inoperative, as such knowledge is rarely had before the facts are established by adjudication. We are not required to decide just how much knowledge is necessary to constitute a discovery of the fraud, so as to put in operation the running of the statute, and it is sufficient to say that the knowledge of plaintiff in this case, in the absence of a showing on his part that it was unavailable as a basis of further inquiry and proceeding, was a discovery of the fraud, and that his action is barred. See *Gebhard v. Sattler*, 40 Iowa, 152; Ang. Lim., sec. 187. The judgment of the district court is

AFFIRMED.

77	242
89	135
77	242
dl24	114

SAWYER V. THE DUBUQUE PRINTING COMPANY *et al.*

Corporations: SALE OF PROPERTY: COMPLAINT OF STOCKHOLDER.

Plaintiff was a stockholder in a printing company which was greatly embarrassed. At a meeting at which all the officers and stockholders, except plaintiff, were present, the assets of the company were transferred to another company, whose paid up stock was taken in payment. Plaintiff was known to be opposed to such transfer, and he was not notified of the meeting at which it was made, nor was he present thereat, but the transaction seems to have been made in good faith and in the interest of the company. *Held* that these facts did not show any fraud upon plaintiff, and that without a showing of fraud he had no ground for complaint either at law or in equity.

Appeal from Dubuque District Court.—HON. C. F. COUCH, Judge.

FILED, May 8, 1889.

THIS is an action to recover damages for an alleged unauthorized and fraudulent disposition of the property of the Dubuque Democrat Printing and Publishing Company, a corporation, whereby plaintiff, as a stockholder in said corporation, was damaged. The action was originally brought at law, and on motion of the plaintiff, against the objections of the defendants, was transferred to and tried as an equitable proceeding. The case was referred to S. P. Adams, Esq., who made a report of his findings of fact and of law, and upon a re-reference amended his report in certain respects, and recommended judgment for plaintiff for \$306.95, instead of for \$422.48, as recommended in the first report. The court held that, as no fraud is reported, the plaintiff is not entitled to judgment; that the recommendation for judgment is based upon causes of action not stated in the pleadings. Therefore it was not approved. The judgment was entered dismissing the case at plaintiff's

Sawyer v. Dubuque Printing Co.

costs, from which the plaintiff appeals. Among other findings the referee reported: "*Ninth*. I find the charge of fraud made by plaintiff is not sustained. *Tenth*. That the sale and transfer of the property of the Democrat Company to the parties who composed the Printing Company was made in good faith." The Democrat Company was organized, in 1882, for the purpose of printing and publishing a daily and weekly newspaper. The stockholders were practical newspaper men, and were employed by the company under contracts by which part of their wages was applied in payment of their stock. Hence but one hundred dollars or two hundred dollars was ever paid in money on the stock. Aside from this one hundred dollars or two hundred dollars, the company had no income except the receipts from its business, and had no outlays except the expenses incident to the business. That the receipts were not always sufficient to meet expenses is evidenced by the fact that there was no money on hand with which to meet overdue bills at the time of the sale complained of. The only assets owned by the company were its subscription lists, advertising contracts, book-accounts, good will, a safe, a limited quantity of cases, type and paper, most of which was of uncertain value, and but little of which could be relied upon for funds with which to pay the \$2,525.79 of existing indebtedness. The Dubuque Telegraph was being published in competition with the Democrat. The appellant claims that the Democrat was the more prosperous of the two. If so, its condition financially shows that there was not room for both papers to prosper. The value of the Telegraph's property is indicated by Quigley's purchase of one-half interest therein for thirty-seven hundred and fifty dollars, he assuming one-half of the indebtedness, not exceeding thirty-eight hundred dollars. Under these circumstances negotiations for a consolidation of the two papers, by sale of the Democrat Company's assets to a new company, were considered at a meeting, December 22, 1884, at which all officers and stockholders of the Democrat Company were present, the plaintiff

Sawyer v. Dubuque Printing Co.

alone opposing the proposition then submitted. On January 7, 1885, at a special meeting, at which all the officers and stockholders of the Democrat Company were present except plaintiff, the terms of sale to the printing company were agreed upon. The plaintiff was not notified of this meeting, and it is evident that some of the parties present desired that he should be, while others desired he should not be, notified. All the assets of the Democrat Company were transferred to the Dubuque Printing company, in consideration of five thousand dollars of the full-paid capital stock of the Dubuque Printing Company, reserving an amount to be collected from the accounts, to be applied on the indebtedness of the Democrat Company. It is controverted whether that amount was one thousand dollars or fifteen hundred dollars. The assets of the Democrat Company were delivered, and the five thousand dollars of capital stock afterwards issued and levied upon by the sheriff to satisfy debts of the Democrat Company.

S. M. Pollock and N. E. Utt, for appellant.

R. W. Stewart, for appellee Dubuque Printing Company.

Wm. Graham, for appellee P. J. Quigley.

GIVEN, C. J.—I. We have carefully examined the exceptions of both parties to these findings, and the evidence upon which these findings are based. We think the findings are sustained by the evidence. Is the plaintiff entitled, upon these facts, to maintain this action? Appellant does not contend that he could maintain it at law, but that because of the frauds alleged equity will grant him relief. Conceding this, the inquiry arises, has fraud been proven? We have already said that the finding of the referee that “the charge of fraud made by plaintiff is not sustained; that the sale and transfer of the property of the Democrat Company by the stockholders and officers of the company to the parties who

The State v. Pierce.

composed the printing company was made in good faith," —is fully sustained by the evidence. The right to maintain the action depending upon whether the transaction was fraudulent, and, fraud not being proven, the district court properly disapproved the recommendation of the referee for judgment, and dismissed the case at the costs of the plaintiff. The financial condition of the Democrat Company was such as to call for prompt action on the part of its directors and stockholders. Its capital stock was without market value, and its assets largely such as only to be available under some special circumstances that would make it desirable. The standing and relation of the Dubuque Telegraph indicated that a consolidation of the two would be attended with success. The only indication of fraud is the fact that plaintiff was not notified of the meeting of January 7. It is not clear that this was intentional; yet, if it were, we think that this should not, under all the necessities and circumstances of the case, vitiate the transaction, which was otherwise honest and in good faith. Concurring in the finding of the referee that the charge of fraud is not sustained, and that the transaction was in good faith, it is unnecessary to consider the other questions made in the record. The judgment of the district court is

AFFIRMED.

THE STATE V. PIERCE.

1. **Larceny: EMBEZZLEMENT: INDICTMENT: DUPLICITY.** In cases of larceny and similar offenses, the taking of several articles may be charged in one indictment. And so an indictment charging that defendant, between certain named dates, and at various days between said dates, being the agent of K., did, by virtue of his said employment, have, receive and take into his possession two pianos and seven organs (describing and giving the value of each), the property of said K., and did then and there embezzle the same, was not bad for duplicity on the ground that it charged the embezzlement of distinct chattels, separately described, and designed to be dealt with separately.

77	245
109	67
77	245
127	682

The State v. Pierce.

2. **Criminal Law: ARRAIGNMENT: WAIVER: TWICE IN JEOPARDY.** In a criminal prosecution, after a jury had been empaneled and sworn and the opening statement had been made for the state, defendant suggested that there had been no arraignment nor plea entered. Thereupon the court ordered him to be arraigned, which was done against his objection, and he asked and was given time to plead, and the jury was discharged, to which he excepted. Next day he pleaded not guilty, and that he had been once in jeopardy by reason of the proceedings of the day before. *Held*—
- (1) That the court did not err in ordering the arraignment; because defendant's conduct did not amount to a waiver of arraignment.
 - (2) That he was not put in jeopardy by the previous day's proceedings. (Compare *State v. Falconer*, 70 Iowa, 418; *State v. Parker*, 66 Iowa, 586.)
8. **Larceny: EMBEZZLEMENT: EVIDENCE.** Where the evidence showed that defendant, an agent, converted to his own use the property of his principal, and the only question was as to his fraudulent intent; and it appeared that the principal was entitled either to the property or its value in money, for which defendant was required to account; and the evidence tended to show that he had concealed the facts as to the disposition of some of the property, and rendered a false account of his agency in regard to it, and that he failed to comply with the principal's demand for the property,—*held* that a verdict of guilty of embezzlement could not be set aside in this court for want of evidence to support it.

Appeal from Boone District Court.—HON. D. D. MIRACLE, Judge.

FILED, MAY 9, 1889.

THE defendant was convicted of the crime of larceny committed by the embezzlement of property of the value of \$106.50. From the judgment of the court requiring him to be imprisoned in the penitentiary at Ft. Madison at hard labor for the term of one year he appeals.

A. H. Denman, for appellant.

A. J. Baker, Attorney General, for the State.

ROBINSON, J.—The portions of the indictment under which defendant was convicted, which we need to

The State v. Pierce.

consider, are as follows: "The grand jury of the county of Boone, in the name and by the authority of the state of Iowa, accuse Philo Pierce of the crime of larceny, committed as follows: That said Philo Pierce did, in said county of Boone and state of Iowa, between the twenty-first day of August, A. D. 1886, and the first day of December, 1886, and at various days between said dates, being then and there the agent of the W. W. Kimball Company, an incorporate company, and over the age of sixteen years, then and there, by virtue of his said employment, have, receive and take into his possession certain property, to-wit: [Here is given a specific description of each of two pianos and seven organs, including the separate value of each,] all being the property of the said W. W. Kimball Company; and that the said Philo Pierce did then and there unlawfully, feloniously and fraudulently embezzle and convert to his own use, without the consent of the said W. W. Kimball Company, his employer, the aforesaid property, by which the said Philo Pierce is deemed to have committed the crime of larceny. * * *" On the thirteenth day of April, 1887, the cause coming on for trial, the state appeared by attorneys, and the defendant appeared personally and by attorneys. A jury was called, empaneled and sworn, the indictment was read, and the opening statements were made for the state, when counsel for defendant suggested that there had been no arraignment nor plea entered. The court found that such was the case, and ordered the defendant arraigned, which was done against his objection. He asked time to plead, and was given one day for that purpose, and the jury was discharged, to which defendant excepted. On the next day the defendant entered a written plea of not guilty, and also pleaded that he had been once in jeopardy by reason of the proceedings of the day before, which were stated. A demurrer to the second plea was sustained.

I. It is insisted by appellant that the indictment is bad for duplicity, in that it charges the embezzlement

1. LARCENY:
embezzle-
ment: indict-
ment: dupli-
city.

of distinct chattels, separately described, and designed to be dealt with separately. The instruments in controversy seem to have been treated as part of a stock belonging to the W. W. Kimball Company, in the hands of defendant for sale. A separate account with each instrument was not kept, but all were included in one account. The contract between defendant and the company was one of agency. The instruments were to remain the property of the company until they were sold, and they were to be sold only according to specified terms. In case of time contracts of sale the blank forms of the company were to be used. Cash and contracts taken were to be promptly remitted to the company. All instruments remaining in the hands of defendant longer than thirty days were to be subject to the order of the company. Defendant was required to account to the company for the invoice prices of the goods. Either party had the right to terminate the agency at any time, and the stock was to be subject to the order of the company. It has been held that in cases of larceny and similar offenses the taking of several articles may be charged in a single count. Whart. Crim. Pl., secs. 252, 470. See, also, *State v. Newton*, 42 Vt. 537; *Sprouse v. Com.*, 81 Va. 374, and case cited; *Reg. v. Winnall*, 5 Cox, Crim. Cas. 326; 1 Whart. Crim. Law, secs. 931, 1042. The indictment does not allege different conversions of property. The language used is not as clear and direct as it might have been, but we think the meaning is evident. It charges that the wrongful conversion occurred "then and there," referring to the time fixed in the indictment, to-wit, the time between the twenty-first day of August and the first day of December, 1886. The words, "and at various days between said dates," add nothing to the indictment, and are mere surplusage.

II. It is claimed that the court erred in ordering the arraignment of defendant. His counsel argues that

The State v. Pierce.

3. CRIMINAL
law: arraignment: waiver:
twice in
jeopardy.

it was the privilege of defendant to waive arraignment, and that when he objected to its being done he in effect did waive it; that it was his right to have a speedy trial, and that the trial should have proceeded. If defendant really desired to waive arraignment, and to proceed to trial to the jury first empaneled, he should have made his desire known. He not only failed to do that, but asked and was given time to plead. His special plea was based on the theory that he had been once in jeopardy, and could not be put on trial again for the same offense. That the theory is not well founded was determined in *State v. Falconer*, 70 Iowa, 418, and *State v. Parker*, 66 Iowa, 586; and it seems to have been abandoned by defendant. We think the claim now made is without merit.

3. LARCENY:
embezzlement: evidence.

III. It is insisted that the verdict was not sustained by the evidence. There was some conflict in the evidence as to some of the instruments, but we are of the opinion that the jury were authorized to find that defendant was the agent of the W. W. Kimball Company; that he received its property as such agent; and that he converted its property to his own use, with a fraudulent intent. There is no room for controversy as to any of these facts excepting the one last named. Defendant denies that any demand for the property in controversy was made upon him, and claims to have sold or otherwise disposed of and accounted for all of it according to the terms of his contract. But it is scarcely denied, and is clearly proven, that the company is entitled either to property of considerable value, or to its equivalent in money, for which defendant was required to account. Evidence was given which tended to show that defendant concealed the facts as to the disposition made of some of the property, and that he rendered a false account of his agency in regard to it. At least two witnesses testify to a demand for the property in controversy, made on the part of the company. It is not shown that defendant complied with the demand, but it appears

The State v. Kuhner.

that he failed to do so. It was the province of the jury to weigh and determine the effect of the evidence. We are of the opinion that the evidence sustains the verdict.

IV. Other questions are discussed by counsel, but some of them fall within decisions of this court heretofore rendered, and others are of no general interest. We have examined the record with care, but find no error prejudicial to defendant. The judgment of the district court is

AFFIRMED.

THE STATE V. KUHNER *et al.*

Appeal: CRIMINAL CASE: EVIDENCE WANTING. The grounds of the appeal in this case require a consideration of the evidence, but appellee filed a paper denying appellants' abstract of the evidence on the ground that it was not made of record by bill of exceptions, nor certified in any manner, which denial is not controverted, and must be taken as true. *Held* that the questions raised by the appeal could not be considered, and that the judgment should be affirmed.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, May 9, 1889.

THE defendants were indicted, tried and convicted upon a charge of keeping a liquor nuisance, and they appeal.

Guthrie & Maley, for appellants.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—The defendants demand a reversal of the cause upon grounds which cannot be considered without an abstract of the evidence in the case, or at least without some showing of what the evidence tended

77 250
96 250
77 250
1125 500

Finke v. Zeigelmiller.

to prove. The attorney general filed no argument in this court. He filed a paper in denial of appellants' abstract of the evidence, upon the grounds that there is no bill of exceptions making the evidence of record, and that the evidence is not certified to in any manner. This is not denied by appellants, and it must be accepted as true. The judgment of the district court will be

AFFIRMED.

FINKE V. ZEIGELMILLER *et al.*

Highways: ESTABLISHMENT: APPEAL: NOTICE: JURISDICTION. The provision of section 959 of the Code, providing that if a highway is established on condition that the petitioners therefor pay the damages allowed, notice of appeal by one claiming damages must be served on the four persons first named in the petition for the highway, if there are so many who reside in the county, is mandatory, and without such service the district court has no jurisdiction to entertain the appeal. It is immaterial whether or not such persons are interested in the appeal

Appeal from Des Moines District Court.—HON. CHARLES H. PHELPS, Judge.

FILED, MAY 9, 1889.

PROCEEDING for the establishment of a highway. There was an appeal to the district court from the allowance of damage. The district court dismissed the appeal, and gave judgment for the defendant. The plaintiff brings this appeal.

Antrobus & McArthur, for appellant.

Seerley & Clark, for appellees.

GRANGER, J.—On September 14, 1887, the board of supervisors of Des Moines county established a highway upon condition that the petitioners should pay to the plaintiff damages to the amount of one hundred and seventy-five dollars. From this allowance of damages

the plaintiff attempted an appeal to the district court, and the sufficiency of that appeal is the question before us. The first four names on the petition are L. Zeigelmiller, J. Landeck, H. Scheib and F. Schnittger. There was an acceptance of service of a notice of appeal by the auditor of the county, September 16, 1887, and on the next day a notice was served on Henry Wehage and Henry Scheib, and on October 7, 1887, a notice was served on L. Zeigelmiller. In the district court the defendants moved to dismiss the appeal, for the reason that no notice had been served as required by law, and the court was without jurisdiction; which motion was sustained, and this ruling presents the only question for us. Code, section 959, provides that "any applicant for damages claimed to be caused by the establishment of any highway may appeal from the final decision of the board of supervisors to the circuit court of the county in which the land lies, but notice of such appeal must be served on the county auditor within twenty days after the decision is made. If the highway has been established on condition that the petitioners therefor pay the damages, such notice shall be served on the four persons first named in the petition for the highway, if there are that many who reside in the county." It will be observed that there was not a compliance with this section as to a service on the "four persons first named in the petition." Of this fact there is no dispute in argument, and appellant's contention is that the statute is directory in respect to this service on the four persons named, and that a service upon a less number answers the requirements of the law. Proceedings of this character to an unusual degree affect and interest the general public, which is probably one reason for the statutory requirement. But, in the absence of doubtful interpretation on questions of jurisdictional importance, it is not necessary for us to inquire after the reasons for the enactment. The legislative intent is clearly expressed, and it goes directly to the jurisdiction of the court. *Ita lex scripta est* is of absolute significance in this respect.

Orr v. O'Brien.

It will be observed that one H. Wehage was served with a notice of appeal, and it is made to appear that he is the one having the greatest direct interest in the highway proposed to be established, and has already deposited the allowance of one hundred and seventy-five dollars for the plaintiff, and it is urged in argument that the statute should have a "sensible" construction; that when the county is not responsible for the damage, and where the party who, under the provisions of the order establishing the road, must pay the damage is served, the court will take jurisdiction. A reference to the law will show that, in a case of that kind, the service is required on the four persons first named in the petition. Jurisdiction is all-important to the action of the court. It is obtainable only in the manner provided by law. The statute is its only refuge in this respect, and wherein it does not provide for jurisdiction it has none, and wherein it does so provide it has it only by an observance of its requirements. The statute does not provide for a service on the party interested, but upon certain petitioners, without reference to the extent of their interest. We think the most sensible construction to give the law is to observe its plain requirements. The service was not sufficient to give the district court jurisdiction, and its judgment dismissing the appeal is

AFFIRMED.

ORR V. O'BRIEN.

Highways: NON-USER AND ADVERSE POSSESSION: STATUTE OF LIMITATIONS. In 1864 a highway was established through land now owned by defendant. It was never opened, and what travel there was that way was over the adjacent land. Defendant and those under whom she claims have had actual, open, notorious and adverse possession for more than ten years. *Held* that the right of the public to the highway was extinguished, and that defendant had a right to extend her fences so as to hinder travel along the line of said road and across her adjacent lands. (*Davies v. Huebner*, 45 Iowa, 574, *distinguished*.)

77	253
81	291
77	253
84	350
77	253
89	190
77	253
95	200
77	253
97	602
77	253
106	388
77	253
109	251
77	253
114	475
77	253
117	683
77	253
119	640
77	253
1138	303
1138	432

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, MAY 9, 1889.

ACTION to enjoin the obstruction of a public highway. In 1864 the public highway was established on a certain part of the line between sections 12 and 13, township 85, and thence west. The location is in timber and brush land, and the road has never been opened up or worked by the public. What travel there was had been over the adjacent open country, without reference to the established line. The defendant and her immediate devisor have owned and occupied the land on both sides of that part of said section line for more than ten years prior to the bringing of this suit, and have for more than ten years maintained a fence that inclosed that part of the section line. Recently, before the commencement of this suit, the defendant extended her fence so as to obstruct travel over the ways by which it had theretofore passed. The plaintiff is shown to have such an interest in this highway as to entitle him to maintain this suit.

J. W. Jamison, for appellant.

Sheean & McCarn, for appellee.

GIVEN, C. J.—I. “Mere non-user of an easement of this character, and acquired in this manner, will not operate to defeat the right. Especially is this so when there is no use of the premises adverse to the right of the public.” *Davies v. Huebner*, 45 Iowa, 574. The mere fact that the road was not opened or worked or traveled on the established line does not bar the public from now asserting the right to do so. In that same case it was insisted that, as for more than ten years before the commencement of the suit the owners of the adjacent lands had been in actual, open, notorious and adverse possession of one-half in width

Richmond Bros. v. Sundburg & Co.

of the road in question, without objection by the public, that was an extinguishment of the right of the public as to that part of the road. This court held that "there are cases where the non-user has continued for such a length of time, and private rights of such a character have been acquired by long-continued adverse possession, and the consequent transfer of lands by purchase and sale, that justice demands the public should be estopped from asserting the right to open the highway. The first requisite to establish such an estoppel should be that the adverse possession should continue for more than ten years by analogy of the statute of limitations. Then it should be shown that there was a total abandonment of the road for at least a period of ten years." In the case at bar there was an entire non-user of that portion of the road in controversy from the year 1864 to the present, and actual, open, notorious and adverse holding of possession by the defendant and her devisor for more than ten years. Under these circumstances, we believe the public should be estopped from claiming any right in the part of the line thus inclosed, and that the defendant has a right to extend her fences to the hinderance of travel over the adjacent lands. **AFFIRMED.**

RICHMOND BROS. V. SUNDBURG & CO.

1. **Instructions: STATING ISSUES.** Where the third division of the answer was substantially embraced in the second, it was not necessary to extend the statement of the issues beyond the second division.
2. **Depositions: ERROR OF NOTARY: NO PREJUDICE.** Where the question to witnesses whose depositions were taken was, "In whose care was the car-load sent," but the notary inadvertently wrote it "In whose car," and the answer was that certain persons ordered the car, *held* that the error was not prejudicial, since there was no controversy as to the person in whose care the car was sent, and it was not incompetent to inquire who ordered the car

8. **Sale: CONTENTION AS TO OWNERSHIP OF PROPERTY: EVIDENCE.** In an action for the price of a car-load of poultry shipped to defendants, where defendants denied plaintiff's ownership of the poultry, and claimed that they had bought it of a third person, the testimony of one of the plaintiffs as to a purchase of part of the poultry from such third person, and as to such person's indebtedness, was competent and material as showing plaintiff's title; and in such case there was no error in admitting the bill of lading and the livestock contract, as they tended to show to and by whom the shipment was made; nor was there any error in admitting the testimony of one of plaintiffs as to who ordered the car; why the third person went with the car; what authority he had to settle for the car; that defendants never paid him for the poultry; and that they had made no remittance to plaintiffs for it.
4. **Evidence: IMPEACHING WITNESS BY LETTERS.** One who is a mere witness in a case cannot be impeached by letters written by him, but which have not been called to his attention when on the stand.
5. ———: **LETTERS FROM THIRD PERSONS.** Letters and telegrams from persons not parties to the action, sent to defendants, relating to their former business, and not shown to have been known to the plaintiffs, nor to have any connection with the subject-matter of the action, are not admissible in evidence.
6. **Instructions: REPETITION NOT REQUIRED.** Where the instructions given by the court on its own motion state plainly, fully, concisely and fairly the issues to be determined, and the law applicable thereto, it is not error to refuse other instructions asked.
7. **New Trial: VERDICT JUSTIFIED.** Where the verdict was justified by the evidence and instructions, a motion for a new trial, on the ground that the verdict was contrary to the law and the evidence, was properly overruled.

Appeal from Montgomery District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, MAY 9, 1889.

ACTION to recover the value of one car-load of poultry. Trial to a jury. Verdict and judgment for plaintiffs. Defendants appeal.

W. S. Strawn, for appellants.

Smith McPherson, for appellees.

GIVEN, C. J.—I. A close examination of this somewhat lengthy record, and of the thirty-three assignments of errors, with the arguments thereon, discloses that the only point of controversy between the parties is whether the defendants are accountable to the plaintiffs for a certain car-load of poultry which the defendants received and applied to their own use, and for which they deny any liability to the plaintiffs. The plaintiffs claim that they owned and shipped the car-load of poultry in question, consigned to the defendants. The defendants deny that the plaintiffs owned said poultry, but say that the same was delivered to them by J. W. Robertson, of J. W. Robertson & Co., with whom they had long dealt in that line, and to whom they had advanced money to buy the poultry, and to whom they fully accounted and made payment for the same.

II. The first error assigned is that the court did not fully state the defenses presented by the third division of the answer. The third division is so substantially embraced in the second as to admit all the proofs that were offered, and to have extended the statement of the issue was unnecessary, and would have tended to confusion.

III. In taking the depositions of J. W. Robertson and of George Richmond upon written interrogatories, the cross-question was put: "In whose care was the car-load claimed for in this action sent to Chicago?" The notary inadvertently wrote it, "In whose car?" and the answer was: "Richmond Bros. ordered the car at Webster." No prejudice could have resulted from this mistake, as there was no controversy but that J. W. Robertson did accompany the car, and it was competent to prove who procured the car.

George Richmond was inquired of as to a purchase of poultry from Robertson & Co., which formed a part

 Richmond Bros. v. Sundburg & Co.

3. **SALM:** contention as to ownership of property: evidence.

of the car-load, and as to the indebtedness of Robertson & Co. As the defendants deny plaintiff's ownership of the poultry, and claim the same under Robertson & Co., this testimony was competent and material, as showing the plaintiffs' title.

There was no error in admitting the bill of lading nor the live-stock contract in evidence, as they tended to show by and to whom the shipment was made. Nor was there any error in admitting in evidence the testimony of A. M. Richmond as to who ordered the car; why Robertson went with the car; what authority Robertson had to settle for the car; that the defendants never paid him for the poultry; or that they had made no remittance to the plaintiffs for the poultry.

IV. The defendants offered certain letters and telegrams from Robertson & Co. to them, concerning their past transactions, and what Robertson & Co. were going to do; claiming that the same were admissible, as going to impeach Robertson, if for no other purpose. Robertson's relation to the case is simply that of a witness, and none of these letters were called to his attention at the time of his examination, and hence are not admissible, even for impeaching purposes.

4. **EVIDENCE:** impeaching witness by letters.

V. Exhibits B, 1 to 4, are letters and telegrams from Robertson & Co. to defendants, relating to their former business, and are not shown to have been known to the plaintiffs, nor to have had any connection with the car of poultry in question. They were therefore properly excluded.

5. **—:** letters from third persons.

VI. The seven instructions given by the court on its own motion state plainly, fully, concisely and fairly the issue to be determined, and the law applicable thereto, and hence there was no error in the instructions given; and, as these instructions cover fully the law of the case, there was no error in refusing those asked by the defendants.

6. **INSTRUCTIONS:** repetition not required.

VII. Under the testimony and instructions the jury might properly find, as they did, for the plaintiffs;

Damon v. Weston.

7. New trial :
verdict justified.

hence there was no error in overruling the defendants' motion for a new trial, or in not holding that the verdict was contrary to the law, or to the weight of the evidence. The judgment of the district court is **AFFIRMED.**

DAMON V. WESTON.

1. **Vendor and Vendee: ABSOLUTE OR OPTIONAL SALE: BREACH: PLEADING AND EVIDENCE: TENDER.** Where there is an absolute sale of land with an agreement to convey upon a certain day upon payment of the price, but before that day the vendor conveys it to another, and thus puts it out of his power to convey to the vendee, the latter, in an action for damages, need not allege nor prove that he was able and offered to perform on his part on the day named; but if the agreement was a mere option to the vendee to purchase, or if the conveyance to the third party was conditional, so that it was not out of the power of the vendor to convey to the vendee, and the vendee was informed of that fact, then, to give the vendee a right of action, he must have tendered performance on his part on the day named.
2. ——— : **VALUE OF LAND: CROSS-EXAMINATION.** Where a witness has testified to the value of land on a certain day, it is proper cross-examination to ask him what it is worth at the time of trial, for the purpose of showing the value of his opinion.
3. ——— : **FAILURE TO CONVEY: EVIDENCE.** In an action for a breach of contract to convey, where the defendant had conveyed to another prior to the day set for payment by and conveyance to plaintiff, defendant was properly permitted to show a verbal promise on the part of his grantee to reconvey, and there was no error in refusing to allow plaintiff to show that the grantee had not placed his deed in escrow.

Appeal from Pottawattamie District Court.—HON.
C. F. LOOFBOUROW, Judge.

FILED, MAY 9, 1889.

ACTION to recover damages for an alleged breach of contract for the sale of real estate. Trial to a jury. Verdict and judgment for defendant. Plaintiff appeals.

The plaintiff alleges a verbal contract by which, on the first day of February, 1887, he purchased from defendant the land described at the agreed price of five

Damon v. Weston.

thousand dollars, twenty dollars of which was to be and was paid in cash ; nine hundred and eighty dollars to be paid February 5, 1887 ; two thousand dollars in six, and two thousand dollars in twelve months,—with interest,—the last two payments to be evidenced by notes, and secured by mortgage upon the land ; the defendant to deed the land to the plaintiff upon payment of the nine hundred and eighty dollars, on February 5. The plaintiff further alleges that he would have been ready and willing to pay the nine hundred and eighty dollars, and to otherwise execute the contract, on the fifth of February ; that, on the second day of February, the defendant sold and conveyed said land to George N. Keeline, and thereby put it out of his power to convey to the plaintiff according to said agreement. Therefore the plaintiff says he is damaged five thousand dollars, which he asks to recover.

The defendant admits that he received the twenty dollars from the plaintiff, but denies that it was upon a contract of purchase and sale. He avers that it was for the privilege of an option on said land at the price and on the terms named, until the fifth day of February, 1887 ; that the plaintiff has never exercised said option ; that the deed to Mr. Keeline was upon the express condition that it was not to become operative except in the event that the plaintiff failed to purchase the land ; that, on the fifth day of February, the defendant and Keeline were able, ready and willing to deed said land to the plaintiff upon the terms, but that, immediately upon the recording of the deed to Keeline, the plaintiff did not make any preparations to purchase said lands, and was not on the fifth day of February able to perform said contract.

L. W. Ross and Henry Ford, for appellant.

Wright, Baldwin & Haldane, for appellee.

GIVEN, C. J.—I. The plaintiff rests his right to recover upon the claim that the agreement between him

Damon v. Weston.

1. Vendor and
vendee: abso-
lute or op-
tional sale:
breach: plead-
ing and evi-
dence: tender.

and the defendant was absolute, and that the defendant put it out of his power to perform by conveying the land to Keeline. If such was the case, it was not necessary for the plaintiff to allege or prove that he was able to and offered to perform the agreement on his part. He only alleged that he would have been ready and willing to perform had it not been for the conveyance to Keeline. There is no allegation that he was able and willing, or that he tendered performance, nor was such allegation necessary upon his theory of the case. The court very properly directed the jury to first determine whether the agreement was absolute or optional, and then proceeded to instruct them as to the rights of the parties in either event; saying that, if the agreement was an option, or if the conveyance to Keeline was conditional, so that it was not out of the power of the defendant to convey to the plaintiff, and the plaintiff was informed of that fact, then, to give the plaintiff the right of action, he must have tendered performance on his part; and, as no tender of performance had been made, the plaintiff could only recover upon finding that the agreement was absolute, and that the conveyance to Keeline was without condition, or, if conditional, that the plaintiff was not informed thereof. There was no error in excluding the testimony offered as to plaintiff's ability and willingness to perform the agreement, nor of the evidence offered by the defendant tending to show inability or unwillingness on the part of the plaintiff to perform the agreement. The cross-examination referred to did not have that tendency.

II. On the cross-examination of the witness introduced by the plaintiff to prove the value of the land on the fifth day of February, the court permitted defendant, over plaintiff's objection, to ask what the land was then worth. This was proper cross-examination, for the purpose of establishing the weight that should be given to the judgment of the witness, and, under the plain instruction

2. —: value of
land: cross-
examination.

Damon v. Weston.

given as to the measure of damage, it could not have been misunderstood to the plaintiff's prejudice.

III. The court instructed the jury, in effect, that if the deed was made to Keeline under an arrangement that he should reconvey in case the plaintiff elected to take the land, and the defendant was, by virtue of this arrangement, in a condition where he could still perform his contract, and convey the land to plaintiff, and this was made known to the plaintiff before the fifth day of February, then such conditional transfer to Keeline would not relieve the plaintiff of the necessity of offering the balance of the purchase money within the time agreed on in order to maintain this action. This instruction was properly given, and hence there was no error in permitting defendant, against the objection of the plaintiff, to introduce evidence tending to show a verbal promise by Keeline to reconvey, nor refusing to allow the plaintiff to show that Keeline had not placed his deed for that purpose in escrow.

IV. The instructions asked by the plaintiff, and refused, are substantially embraced in those given. We have carefully considered the instructions given, the exceptions thereto, and the argument of counsel in support of their exceptions, but find no error therein.

V. The jury might have found from the testimony that the agreement was optional, and hence have found for the defendant, because there was no tender of performance by the plaintiff; or they might have found that the conveyance to Keeline was upon the condition claimed, and that the plaintiff was informed thereof, and made no tender of performance,—in either of which cases their verdict would properly be for the defendant. Finding no error, the judgment is

AFFIRMED.

HEAD BROTHERS V. THOMPSON *et al.*

1. **Mortgages: ASSUMPTION BY PURCHASER OF LAND: AGREEMENT WITHOUT MUTUALITY: FRAUD: EVIDENCE.** Defendants, husband and wife, were owing four certain mortgages on their land, which plaintiffs either owned or had authority to collect; also another mortgage to M., which was of record, but of which plaintiffs had no actual notice. Defendants proposed to convey the land to plaintiffs in satisfaction of the encumbrances, and plaintiffs accepted the proposition, and a plain warranty deed without reservations was made accordingly, but the evidence (see opinion) shows that plaintiffs understood that the four mortgages held by them were the only encumbrances, and that they did not intend to assume any other, and that defendants knew of the mortgage to M. *Held—*

(1) That if defendants understood that plaintiffs meant to assume the mortgage to M. also, then the minds of the parties did not meet, and there was no agreement in law.

(2) That if defendants knew that plaintiffs were relying on their statements as to liens, then it was a fraud for them not to disclose the existence of the mortgage to M., and such a fraud as to make the agreement void, if one was made.

2. **Deed: DELIVERY: FACTS NOT CONSTITUTING.** Defendants entered into an agreement with plaintiffs to convey to them certain land in satisfaction of certain mortgages thereon which plaintiffs either owned or controlled, and a deed was at the time made by defendants, who lived in the country, and left at plaintiffs' bank. The deed was a plain warranty deed, and was made to one of the plaintiffs who was at the time absent. No consideration passed at the time,—the mortgages, which were the sole consideration, not being at hand, but plaintiffs were to procure them to be assigned and sent to them, and then the transaction was to be closed up. *Held* that there was no delivery of the deed, and that it was of no effect until the mortgages were delivered.

Appeal from Greene District Court.—HON. J. P. CONNER, Judge.

FILED, MAY 9, 1889.

ACTION in equity for judgments on notes, and decree foreclosing four mortgages, given to secure the

77	263
90	699
77	263
113	640

Head Brothers v. Thompson.

same, on a certain quarter section of land. The defendants' answer admits that but for the matter alleged in defense the plaintiffs would be entitled to decree as prayed. They allege as defense that on or about the twenty-eighth day of January, 1888, the plaintiffs, through Mahlon Head, a member of the firm, verbally contracted with the defendants to take said land, and to pay therefor all the liens and encumbrances then standing against it; that on the same day, and in pursuance of said agreement, the defendants executed to Mahlon Head their deed to said land, subject to all liens and encumbrances then standing against it; and that the said deed was delivered to and accepted by the plaintiffs in full payment of the four mortgages set out in the petition, and of all liens and encumbrances against said land; wherefore defendants ask that the notes and mortgages sued on be canceled; that a decree be entered that the plaintiffs and Mahlon Head take said land subject to the other liens not sued on; and that all said liens be decreed paid to the plaintiffs and Mahlon Head. The plaintiffs, in reply, deny that it was agreed as alleged by defendants, and aver that George W. Thompson of his own accord proposed to deed said lands to avoid foreclosure, and that the defendants, without any agreement whatever on the part of the plaintiffs, executed a warranty deed conveying said land to Albert Head, one of the plaintiffs. That the defendants, with the intent to defraud the plaintiffs, represented that there was no encumbrance on said land other than plaintiffs' mortgage, by declaring in said deed that said premises were free and clear of all liens and encumbrances. Plaintiffs deny that said deed was ever delivered to them or either of them, and allege that they refused to accept the same, and that it was destroyed in the presence of, and with the knowledge and consent of, defendant George W. Thompson. There is no controversy but that the plaintiffs held the notes and four mortgages sued upon; that they notified defendants that the same were about to become due, and

Head Brothers v. Thompson.

that the defendants called on Mahlon Head with reference thereto ; that on the day they called Mahlon Head prepared a deed for the land from the defendants to himself or Albert Head ; that the defendants executed and acknowledged said deed in the plaintiffs' bank, and left it there ; that soon thereafter, on the same day, Mahlon Head examined the records, and, finding thereon a mortgage from the defendants to C. W. and J. N. Meath on the same land, for sixteen hundred dollars, met the defendant George W. Thompson, and told him that there was another mortgage against that land ; that he did not know anything about it when he wrote the deed ; that he could not stand it ; that he could not buy it and pay the the encumbrances on it ; that it was more than the land was worth ; and that he would destroy the deed, and did then and there tear the deed in pieces. The further facts appear in the opinion.

Howard & Rose, for appellants.

A. M. Head, for appellees.

GIVEN, C. J.—I. The points in controversy are whether the plaintiffs agreed to pay all the encumbrances standing against the land, and whether the deed was delivered. The agreement must be arrived at largely from circumstances, as the testimony of both parties shows that but little was said. It is evident from the circumstances and what was said and done that the defendants intended to convey to the plaintiffs, or to whichever of them they might designate, their interest in the land ; and that the plaintiffs intended to receive such conveyance in full satisfaction of the notes and four mortgages in suit. It is equally evident that at the time of making the deed the defendants did, and the plaintiffs did not, know of the existence of the Meath mortgage, and that the defendants made no mention of that mortgage at the time. The defendants both testify that the deed prepared by Mahlon Head and executed by them expressly provided that he was taking the land,

1. **MORTGAGES:**
assumption by
purchaser of
land : agree-
ment without
mutuality :
fraud : evi-
dence.

Head Brothers v. Thompson.

assuming all the encumbrances thereon ; and the plaintiff Mahlon Head testifies that it was just a plain warranty deed, with no exceptions in it of any kind. It appears from the testimony of Mahlon Head that he did not know of the Meath mortgage. His examination of the records, his declaration, immediately after, that he would not accept the deed, and his destroying the same, show that he did not know of the Meath mortgage at the time he wrote the deed. He evidently was acting on the belief that there were no other encumbrances except plaintiffs' four mortgages ; hence it would have been unusual should he have expressed any reservation in the deed, as the four mortgages were to be satisfied by it. The weight of the evidence is in favor of the conclusion that the deed was a plain warranty deed without any exceptions in it.

II. The objection to the testimony of Mrs. Thompson as to what passed between her and her husband before going to the bank to execute the deed was well taken.

III. In support of the defense, Mrs. Thompson testifies that on going to the bank Mahlon Head said : "Mrs. Thompson, this is a warranty deed of your quarter section of land, conveying the farm to me. I am taking it, and assuming all encumbrances thereon. If you are willing, sign your name right here." Mr. Thompson testifies that on calling at the bank Mahlon Head said : "'What shall we do with regard to the mortgages on your land?' I told him the best thing I could do was to turn the land over to him, and he assume all the encumbrances on the land. He said, 'All right ; I would rather do that than foreclose the mortgage.'"

Mahlon Head testifies that when Mr. Thompson came into the bank he said to him : "'George, what are you going to do about that land and those mortgages and those notes?' and he answered : 'All I can do is to turn them over to you. We can deed the land to you ;' and I said : 'Will you and your wife sign the deed?' and he said, 'Yes ; we would like to get along with as little expense as possible.'"

That when Mr. Thompson

Head Brothers v. Thompson.

returned with Mrs. Thompson he said to her, "Mrs. Thompson, I want you to sign a deed," and she signed it. These apparent contradictions are easily reconciled when we remember that the defendants were acting with a full knowledge of the Meath mortgage, and that Mahlon Head was acting without such knowledge, and with the supposition that there was no other encumbrance than the plaintiffs'. Mr. Thompson testified that Mahlon Head asked him if there were any liens filed, and if there were any judgments against the land, and that he told him "No," and again that he did not tell him anything about the Meath mortgage. The reasonable conclusion is that Head acted upon the belief that there were no other encumbrances than the plaintiffs' four mortgages, and hence did not intend to be understood as assuming the Meath mortgage; while, upon the other hand, the defendants acted upon the understanding that he was agreeing to assume the Meath mortgage. If such be the correct conclusion, then that essential element of an agreement, mutuality, is lacking, and there was no agreement at all.

IV. Head's inquiries of Mr. Thompson as to liens were such as to show him that Head was relying upon his statements, and good faith required that Thompson should have declared the existence of the Meath mortgage. This he did not do. Though it is true that Head had constructive notice, yet, if Thompson knew that Head was relying upon his statements, then it was a fraud for him not to have disclosed the existence of the Meath mortgage, and such a fraud as should make void the agreement if one were made.

V. As to the delivery of the deed, we hold that it is immaterial whether it was executed to Mahlon Head or to Albert Head. As Mahlon Head had authority to take the deed in Albert's name, we think it clear that he had authority to receive it, but the question remains, was there a delivery of the deed to Mahlon Head? The testimony shows that when executed it was left on the plaintiffs' bank

2. DEED: delivery: facts not constituting.

Head Brothers v. Thompson.

counter, and soon thereafter was in the personal possession of Mahlon Head at the time he tore it up. It appears, however, that no part of the consideration had yet passed to the defendants. Mr. Thompson testifies that Head said to him that he did not have the mortgages and notes there then ; that in the course of two or three weeks he would have all the papers, and then turn them over. Mr. Head testifies: "I remarked to him that I did not have the Kellogg mortgages here then ; that I would send for them, and have them assigned to Head Bros., and when they come, if all right, I will deliver to you the mortgages." Mr. Lovejoy, the notary, testifies that the deed was to Albert Head ; that when he came into the bank to take the acknowledgment "Mr. Thompson held the deed in his hand. He came up and signed it, also his wife ; and he said something about her mortgage, * * * about taking it up, * * * and about some one, * * * I think it was Mr. Kellogg's mortgage. I remember distinctly that Mr. Head said: 'You sign this deed, and I will take up her mortgages.' He mentioned his and Kellogg's mortgages." It appears there were no exceptions in the deed ; that it was to Albert Head, who was then absent ; that it remained for the plaintiffs to get an assignment of the Kellogg notes and mortgages, and that they, with plaintiffs' notes and mortgages, were to be canceled and delivered up if everything was all right. We conclude that the deed was executed at that time, because of the presence of Mrs. Thompson in town, and that the deed was to be held and be of no effect until the notes and mortgages were canceled and surrendered. Entertaining these views, the decree of the district court is

AFFIRMED.

THE STATE V. TURNEY.

77	269
98	730
77	269
122	140

1. **Criminal Law: APPEAL: CLERK'S CERTIFICATE TO EXPLAIN RECORD: EVIDENCE ON TRIAL.** In this case the record in the district court, as certified to this court, is full and regular, and shows a trial by jury upon the evidence, and a verdict of guilty. The clerk of the district court, however, certifies that no evidence was introduced on the trial except the minutes of evidence taken before the grand jury. *Held* that the clerk had no legal authority to make such certificate, and that it could not be considered, but that this court, in the absence of exceptions to the evidence, must presume that defendant was convicted upon proper evidence; but if such certificate were considered and taken as true, still this court could not interfere, because no objection was made to the evidence named therein, and it was competent for defendant to waive the privilege of being confronted with the witnesses against him. (See *State v. Polson*, 29 Iowa, 183, and *State v. Fooks*, 65 Iowa, 452.)
2. **Larceny and Burglary: MITIGATION OF PUNISHMENT ON APPEAL.** Defendant was convicted of burglary on six indictments and of larceny, committed in connection with his burglaries, on six other indictments, and was sentenced in the aggregate to seventeen and one-half years in the penitentiary. There can be no doubt of his guilt in each case. The total value of the stolen property was found to be \$566. *Held* that this court must be governed wholly by the record, and that there is nothing in the record in this case justifying a mitigation of the sentence. Considerations in defendant's favor not found in the record are proper only to be urged in an application to the executive for pardon.

Appeal from Jackson District Court.—HON. WALTER I. HAYES, Judge.

FILED, MAY 9, 1889.

At the December term, 1885, of the district court of Jackson county, twelve indictments were found against the defendant. Six of these indictments charged the defendant with larcenies, and the others were charges for burglariously breaking and entering buildings. The defendant was in custody when the indictments

The State v. Turney.

were found. He was arraigned upon each charge separately, and put upon trial. Verdicts of guilty were returned, and separate judgments were pronounced, by which the defendant was ordered to be confined in the penitentiary for the period of seventeen and one-half years, for all the crimes charged. The defendant appealed in each case, and all of the appeals were submitted to this court upon the same record and argument, and they will be disposed of in one opinion.

C. C. Cole and *A. H. Denman*, for appellants.

John Y. Stone, Attorney General, for the State.

ROTHROCK, J.—I. The judgments in all of the cases were rendered on the tenth day of December, 1885. The defendant has since that time been confined

¹ CRIMINAL law: appeal: clerk's certificate to explain record: evidence on trial.

in the penitentiary. Appeals were taken by the service of the proper notices on the ninth day of December, 1886. After that time the defendant made application for the writ of *habeas corpus* against the warden of the penitentiary, and a trial was had as to the legality of his imprisonment. He was remanded to the custody of the warden, and upon appeal to this court the order was affirmed. See *Turney v. Barr*, 75 Iowa, 758. The appeals in these cases were submitted to this court after the proceeding in *habeas corpus* was finally disposed of. The cases are presented upon transcripts, which are substantially alike. We will give the material part of one of them: "Now, on this tenth day of December, A. D. 1885, this cause came on for trial; the plaintiff appearing by M. V. Gannon, district attorney, and, the defendant being without means with which to employ counsel, the court appointed D. A. Wynkoop, Esq., attorney to defend him. The defendant, being arraigned, says he is indicted by his right name, and pleads not guilty. And thereupon came a jury of twelve good and lawful men, who were duly sworn to well and truly try said cause, and a true verdict render therein. And the said jury, having heard the evidence and received the

The State v. Turney.

charge of the court, returned their verdict in words and figures following, to-wit: 'We, the jury, find the defendant guilty, and find the property stolen to be of the value of forty-five dollars. R. C. Westbrook, Foreman.' And on the same day, to-wit, December 10, 1885, the court sentenced the defendant (he waiving time) to imprisonment in the penitentiary at Anamosa for the term of six months. It is therefore ordered by the court that the defendant, Chester Turney, be taken by the sheriff, and conveyed to the penitentiary at Anamosa, Iowa, and there confined at hard labor for the term of six months; and that D. A. Wynkoop be allowed ten dollars for defending; and that judgment be entered against the defendant for costs."

No complaint is made to the finding and presentment of the indictments by the grand jury, nor to the arraignment and plea, but many objections are made to the manner in which the trials were conducted. It is enough to say that the record above set out shows no error, nor even any irregularity, prejudicial to the defendant. It appears therefrom that the defendant was arraigned; that he pleaded not guilty; that an attorney was appointed by the court to defend him; that a jury was empaneled and sworn; that the jury heard the evidence, and received the charge of the court, and returned its verdict; and that judgment was pronounced thereon on the same day, and defendant waived the time of sentence. These are about all the requisites of an orderly and legal trial of criminal cases. This is the record by which we must be governed in the determination of these appeals. We are not permitted to consider the facts upon which reliance was had in the *habeas corpus* proceeding, nor can we presume that the court pronounced sentence without having allowed six hours to elapse after verdict, as provided by section 4496 of the Code, and the record shows that the time was waived by the defendant.

It is stated in the record that the jury heard the evidence. The clerk of the district court made a certificate, in which he stated that the testimony taken before

The State v. Turney.

the grand jury was read to the trial jury, and that no other evidence was offered in the trials by either party. It is claimed that this was a gross error. It is no part of the duty of the clerk of the district court to make such a certificate. When he has certified the record as the court and the parties have made it, he has done every act which the law authorizes him to perform in a case appealed to this court; and even if the clerk could by certificate make a record, and if it be conceded that the testimony taken before the grand jury was all the evidence introduced on the trials, we could not reverse the judgments on that ground, because no objection was made to the evidence, and it was competent for the defendant to waive the privilege of being confronted with the witnesses against him. *State v. Polson*, 29 Iowa, 133; *State v. Fooks*, 65 Iowa, 452.

There are many other objections urged to the proceedings, but they do not appear of record. We cannot presume error. It must be made to appear affirmatively and from the record. The objections made to the form of the verdicts are absolutely without merit. They should be disregarded by the court, even if the attention of the court below had been called thereto, and a correction asked. The same may be said of objections to the form of the indictments. In short, there is nothing in the record in these cases which authorizes a reversal of the judgments. It is to be remembered that no objection was made nor exception taken to anything which was done in the court below.

II. We come now to what we regard as the only real question in these cases. It is urged with much

earnestness by counsel for appellant that the punishment inflicted upon him is excessive. As we have said, there were twelve indictments. The acts with which the defendant was charged were the breaking and entering stores, a butcher-shop and other buildings, and stealing therefrom certain personal property. For each act two indictments were found,—one for breaking and entering, and the other for the larceny. These are

2. LARCENY and
burglary:
mitigation of
punishment
on appeal.

separate offenses, and under the law indictments may be returned for each, independent of the other. The jury found the stolen property to be of the value of five hundred and sixty-six dollars in the aggregate. The penalty inflicted is seventeen years and six months' imprisonment in the penitentiary. It is not claimed that the defendant's punishment should be reduced because there is doubt of his guilt. Such a claim cannot be made, in the face of the record before us. It is not a case for sympathy, upon the ground that an innocent man has been convicted of crime. The evidence taken before the grand jury is quite full and explicit. It shows without question that the defendant committed the crimes with which he was charged. He was arrested very soon afterwards, and nearly all of the stolen property was found either in his actual possession or concealed in places which he pointed out. In short, he made a full confession of the acts charged, and nearly all of the property was recovered by the owners. In view of these facts, it is easy to understand why no defense was made in his behalf; and as section 3775 of the Code provided that a district attorney was allowed, for each conviction on a plea of guilty, the sum of five dollars, and for each jury trial, in cases of felony, the sum of twenty dollars, to be paid by the county, it is not difficult to comprehend why there were twelve jury trials. It was this unwarranted multiplication of jury trials which gave rise to the gross irregularities of which mention was made in the case of *Turney v. Barr*, above cited. There was no demand for any jury trial for any purpose but to manufacture attorney's fees. The defendant made no real denial of his guilt, and there was no defense that could have been made for him. He broke open buildings and stole property of the value of five hundred and sixty-six dollars, and his crimes demanded more than merely nominal punishment.

In determining the question whether the term of imprisonment should be reduced, we must be governed,

The State v. Turney.

by the record before us. We know nothing of the defendant's antecedents. His previous character, whether good or bad, is an important consideration in determining the question. In short, the record presents no case for mitigation of the sentence. We determined in the case of *Arthur v. Craig*, 48 Iowa, 264, that the governor of the state has power to annex to a pardon any condition, precedent or subsequent, provided it be not illegal, immoral or impossible to be performed. It is well understood that, in exercising the pardoning power, there are many considerations presented to the executive which cannot be considered by this court in passing upon the question of the extent of punishment proper to be inflicted upon a criminal. If this court were to reduce the sentence, we can attach no conditions. We have concluded that we ought not to make any order in the premises. If all that is claimed in defendant's behalf in the argument of his counsel is true, the case is a proper one to be presented to the executive ; but we are not permitted, under the law, to consider questions which do not arise upon the record. The judgment of the district court will be

AFFIRMED.

LEAS V. GARVERICH *et al.*

Tax Title: FRAUD IN OBTAINING: SUBSEQUENT PURCHASER WITH NOTICE: EQUITABLE REDEMPTION. Defendant, believing that the title to his land was uncertain, and that it might be strengthened by a tax title, allowed it to go to tax sale and deed, under an arrangement with one W. that he should buy it and take a tax deed, and afterwards convey it to defendant. W. did buy it at tax sale, but he assigned the certificate to his brother M., which fact was concealed from defendant until after M. had taken a deed, and defendant had paid W. the amount necessary to redeem the land; after which W. removed from the state, and left defendant at the mercy of M. The evidence (see opinion) justifies the conclusion that W. and M. conspired together to cheat defendant through the confidence which he had reposed in W., who seems to have been a somewhat intimate friend of defendant. The land was sold at tax sale for \$51.85, and is shown to be worth seven thousand dollars. M. refused to convey it to defendant unless he would pay him two thousand dollars. About one year later M. sold the land to plaintiff, through plaintiff's attorney, who had full knowledge of the fraud, for sixteen hundred dollars,—five hundred dollars of which was to be paid to the attorney as a fee for recovering possession of the land, which plaintiff knew was occupied by defendant, or some one, adversely to the title which he was purchasing. *Held—*

- (1) That the tax title in the hands of M. was void for fraud, and that it could not prevail against defendant's title.
- (2) That plaintiff was bound by his attorney's knowledge of the fraud, and therefore he acquired by his purchase no better right than M. had.
- (3) That if it were conceded, as claimed by plaintiff, that the attorney was not at the time of the purchase his attorney or agent, yet the circumstances of the transaction were such as to put plaintiff upon inquiry as to defendant's equities, which would have led to a full knowledge of the fraud, and that therefore he must be charged with such knowledge.
- (4) That since the evidence shows that W. was at least the agent of M. in all matters pertaining to the tax purchase and redemption, he had authority to bind M. by the receipt of the redemption money from defendant, and to contract that redemption should be made in a manner and at a time different from that prescribed by statute. And M. having thus received the money which he agreed to accept in discharge of his tax title, pursuant to a valid agreement before entered into, equity will not permit that title to be enforced against defendant. (See *Shoemaker v. Porter*, 41 Iowa, 197.)

Leas v. Garverich,

Appeal from Keokuk Superior Court.—HON. HENRY BANK, JR., Judge.

FILED, MAY 9, 1889.

ACTION in equity to recover the possession of and quiet the title to certain lands. The defendants, in their answer, set up title to the lands, and pray that it be quieted in them. There was a trial on the merits, and a decree dismissing plaintiff's petition and quieting the title in defendants. Plaintiff appeals.

J. T. Smith, for appellant.

Craig, McCrary & Craig, for appellees.

BECK, J.—I. The defendant Garverich has for a great many years occupied and cultivated the land in controversy (one hundred and sixty acres) as a farm and homestead. He failed purposely to pay the taxes upon it for one year, and permitted it to be sold at tax sale, believing that he could thereby acquire a tax title which would strengthen his right to the lands. He unwisely believed that his title possibly might not be perfect, as the land was a part of the Half-Breed tract, the title of which had been for a long time unsettled and in litigation; but at this time it was generally understood to be good. The land was accordingly sold, and a treasurer's deed executed, under the circumstances hereafter disclosed. Plaintiff claims under this tax deed, and defendants claim under the Half-Breed title, which has its origin in a grant by the United States government. It is presumed that defendant has learned by experience, too late to keep him from trouble in this case, but which may impart wisdom to be used in future transactions, that it is safer to trust to the Half-Breed title unsupported, than to imperil the title of his land by permitting a tax title to be acquired by a friend, trusting in his promise to convey such title to him. It is not denied that defendant's title to the land is valid unless

Leas v. Garverich.

it be defeated by plaintiff's tax title, and it may be assumed that the tax title, as disclosed by the records, is regular and valid, unless it be defeated by fraud which defendant insists was practiced by plaintiff and his grantors, whereby defendant was induced to permit a tax deed to be executed without redemption, under a promise that the tax title would be transferred to him. The questions for our determination involve the validity of the tax title held by plaintiff.

II. We will proceed to state briefly the facts disclosed by the evidence, and the conclusions to which they lead us. Defendant, probably without sufficient reason, believed that the title to his lands was uncertain, and might be strengthened by a tax title. We are authorized to infer that, as there had been, in former years, litigation in regard to the tract of which the land is a part, defendant's belief and purposes were honestly entertained. He knew that a notice would be served upon him just prior to the issuing of the tax deed. He depended upon this notice to advise him when to act in order to secure a tax deed pursuant to his plan. The notice, in due time, was served upon defendant, while he was employed threshing his grain with a machine, by W. J. Medes, whom defendant knew quite well. He was a lawyer, an insurance agent, and had been the county superintendent of schools. He had quite often shared in the hospitality of defendant, by taking dinners and staying over night at defendant's house when he was in the neighborhood attending to school business and (using his own language) "looking after voters." We are authorized to infer that he and defendant were political friends, and probably of the same political party. Defendant testifies that he informed Medes of his purpose in permitting the land to be sold for taxes, and requested him to take a deed in his own name, and afterwards to transfer the title to plaintiff. He proposed to pay the money necessary for redemption at or about the time the right of redemption should expire. Medes promised to comply with defendant's request, and declared that it was not necessary that payment

Leas v. Garverich.

should be made on or before the day the right of redemption expired, but if made soon afterwards it would be good. This agreement was distinctly and plainly stated by the parties, according to defendant's testimony. But Medes testifies that no such arrangement was made. Defendant is to an important extent corroborated by a witness, who was present, and heard a small part of the conversation. While the corroboration extends to but a few words of conversation heard by the witness, wherein Medes promised to comply with the request of defendant, it is quite important, and really gives great support to defendant's evidence. This request was connected in the conversation with the notice of redemption served by Medes. This notice was in the name of a brother, H. W. Medes, to whom the other Medes had assigned the tax-sale certificate. Defendant declares that he had no knowledge that any other person than W. J. Medes held the certificate. He knew the last-named by the name of "Will," and he supposed the notice was given by him, and did not know that H. W. Medes was interested in the transaction. He had no different knowledge until after the deed was made, and the fact disclosed to him that his confidence in his friend had seriously imperiled his valuable farm and homestead. The evidence shows that W. J. Medes had bought the land at tax sale, and transferred the certificate to his brother, H. W. The former testifies that in serving the notice he acted as the agent of the latter. Defendant swears that he had no knowledge of these things. About the time the right of redemption expired, defendant testifies that he called upon W. J. Medes, to make redemption from the tax sales, and paid him the amount required to redeem. He was informed by W. J. Medes that the certificate was in possession of his brother, H. W., at Fairfield, who would soon come to Keokuk, where the former lived, and the two would then visit defendant and close the transaction. This promise and arrangement are denied by W. J. Medes; but he does not, directly or indirectly, deny that defendant paid him the money at the visit

Leas v. Garverich.

for the redemption. W. J. Medes was about to remove from the state, and the next day after the visit did leave, and defendant has never since seen him. He and his brother both testify that his brother's money was paid upon the tax purchase, and that he was merely the agent of the brother in all transactions connected with the matter. Instead of the two brothers visiting defendant to settle the tax-sale redemption matter, H. W. went alone, and informed defendant that his brother had removed, and had no interest in the matter, and never had; that he held the certificate, and would convey the land to defendant for two thousand dollars, rather than sell it to others. The land was sold at tax sale for \$51.35, and is shown by the evidence to be worth more than seven thousand dollars. In about one year after this H. W. Medes conveyed the land to plaintiff, under these circumstances. The agent of H. W. Medes, having charge of this tax-title matter, was an attorney; and was employed by plaintiff in some legal business. Through him the interest of Medes was sold to plaintiff for eleven hundred dollars, the attorney to receive five hundred dollars additional as his fee for recovering possession of the land. Plaintiff knew that the title he was purchasing was a tax title; that the land was held adversely by the other claimant, who was resisting the tax title; that he was to pay a fee of five hundred dollars to recover possession of the land,—thus being informed that there was an adverse claimant, who would make a vigorous resistance to the enforcement of the tax title. The plaintiff knew that the attorney with whom he bargained as an agent knew all the facts connected with questions affecting the validity of the tax title. He testifies that he relied upon the attorney's knowledge and information as to these matters. He knew that the land was occupied by defendant, or some one else, adversely to plaintiff's title. The fact that he agreed to pay five hundred dollars for recovering possession and settling the title by an action authorizes these conclusions of fact. The attorney knew all about the tax title. He had been agent and attorney for H. W.

Medes, and had himself held a tax-sale certificate on another tract of land owned by defendant, from which redemption was required about the time it was to be made on the tax sale in controversy. Defendant was in the attorney's office, on business connected with these tax matters, at the time these redemptions were made. We are surely authorized to infer that the attorney had full knowledge of defendant's claim and the fraudulent act whereby he was induced not to make redemption before the time for the execution of the deed had arrived. If the tax title was honestly and fairly obtained, and was valid, it cannot be credited that this attorney would have bargained the land to plaintiff for eleven hundred dollars and his fee of five hundred dollars, when it was well worth more than seven thousand dollars. All the transactions by which the tax title was acquired and conveyed to plaintiff have the offensive odor of fraud, which always arises when simple-minded and confiding men are inveigled out of their lands and other property. We entertain no doubt that H. W. and W. J. Medes conspired together to defraud defendant, and that the attorney had knowledge of the facts in the case. Indeed, the evidence is direct and positive that he had full information of the fraud of the Medes before the deed to plaintiff was made. This information was imparted in more than one conversation between the attorney of defendant and the attorney just referred to.

III. Let it be assumed that W. J. Medes was H. W. Medes' agent. If so, he had full power to receive redemption money and make contracts as to the time and condition of payment. His principal, H. W., is chargeable with knowledge of and responsibility for the frauds of the agent. On this point there can be no doubt. The evidence is uncontradicted that W. J. Medes received the redemption money from defendant. As we have said, he had authority, as agent of his brother, to make contracts in regard to the redemption and receive the money paid therefor. It is, then, a case of redemption from the holder of the tax certificate

or deed pursuant to an agreement before made. That the parties could agree to extend the time of redemption, and that it could be made by payment to the holder of the tax certificate, cannot be doubted. See *Shoemaker v. Porter*, 41 Iowa, 197. Let it be admitted that the redemption was not made in the manner or at the time prescribed by the statute. It nevertheless is regarded by equity as a redemption which will defeat the tax title. The holder of that title received the money he agreed to accept in discharge of his tax title, pursuant to a valid agreement before entered into between the parties. Equity will not permit that title to be enforced against defendant.

IV. Plaintiff endeavors to show that the attorney of whom he bought the land was not at the time his attorney or agent, and only became so after he purchased the land under an agreement made before that event, fixing his compensation, etc. We are not prepared to assent to plaintiff's view, but, for the purpose of the case, we may here concede its correctness. But if plaintiff is not bound by the knowledge of the attorney, for the reason assigned, he was surely put upon inquiry as to the defendant's equities by the facts we have recited and the knowledge he did possess. He was buying lands worth seven thousand dollars. He says he was informed they were worth two thousand dollars or three thousand dollars. They were in adverse possession of defendant, or some one else, who would contest the title vigorously, —so vigorously that a fee of five hundred dollars was thought but a just compensation to be paid to the attorney for his services in that behalf. Surely plaintiff will be charged with knowledge of defendant's claim, when he could have obtained it by simply inquiring of the attorney as to the facts, or by going upon the land, and inquiring of the defendant, the person in possession. Inquiries in these directions, suggested by the facts of which plaintiff had knowledge, would have revealed to plaintiff that defendant made a *bona-fide* claim that the tax title was, as to him, fraudulent, and could not be enforced. Equity will regard plaintiff

Raynor v. Raynor.

as chargeable with notice of all the rights and equities of defendant

V. We reach the conclusion that plaintiff cannot in equity enforce his tax title, which is void on account of fraud, and that defendant is entitled to the relief prayed for in his cross-bill, quieting his title, and setting aside the tax deed, etc. The decree of the district court accords with these views. It also prescribes the amount to be paid by defendant to redeem from the tax sales. No objection is urged as to this provision of the decree. We are not, therefore, called upon to more particularly consider it. The decree of the superior court will be in all respects

AFFIRMED.

RAYNOR *et al.* v. RAYNOR *et al.*

Appeal: NO ARGUMENT FILED: DISMISSAL. Where appellants file no brief or argument in this court, it will be presumed that they have abandoned their appeal, and it will be dismissed.

Appeal from Taylor District Court.—HON. R. C. HENRY, Judge.

FILED, MAY 10, 1889.

THIS is an action in equity, and it involves the ownership and possession of a farm. There was a decree for the plaintiffs. Defendants appeal.

J. R. Good and J. P. Flick, for appellants.

J. L. Brown and Chas. Thomas, for appellees.

ROTHROCK, J.—The appeal was submitted to the court for its decision on the thirtieth day of October, 1888. At the same time, and in connection with the general submission of the cause, there was a motion by appellee to affirm taken with the case. No brief nor argument

Condray v. Stifel.

upon the merits of the appeal was filed nor submitted by either party. In this state of the record the decree of the district court must be affirmed. Without a brief of points or an argument by appellants we assume that they have abandoned their appeal.

AFFIRMED.

CONDRAV V. STIFEL *et al.*

Justices and Their Courts: APPEAL: PRACTICE: EXCEPTIONS.

While an objection in a justice's court need not be made as formally, and a record of it made as fully, as is required in courts of record, yet a party objecting to a decision rendered in a justice's court must, in an intelligible manner, and at the time, make his objection known, in order to have the decision reviewed by proceedings in error. (See Code, sec. 8516.)

Appeal from Clarke District Court.—HON. JOHN W. HARVEY, Judge.

FILED, MAY 10, 1889.

THIS action was commenced in justice's court to recover damages alleged to have been caused by the wilful and malicious destruction of certain straw. The defendants appeared, and filed an answer, which set out several defenses to plaintiff's right of recovery, including a counter-claim. Plaintiff filed a motion to strike several divisions from the answer, which was sustained. The justice afterwards, on his own motion, struck out the counter-claim. A trial was then had, which resulted in a judgment for the plaintiff. No exception to the rulings nor to the judgment was taken. The defendants removed the cause to the district court by proceedings in error. The district court found that the justice erred in sustaining the motion to strike from the answer, and in striking out the counter-claim on his own motion, and ordered the cause remanded to justice's court for trial. From that order the plaintiff appeals.

W. M. Wilson, for appellant.

No appearance for appellees.

ROBINSON, J.—The amount in controversy not exceeding one hundred dollars, the trial judge certified that the cause involves the determination of a legal question upon which it is desirable to have the opinion of this court, which is substantially as follows: “In an action in justice’s court, is it necessary, in order to have a ruling reviewed by proceedings in error, to except to such ruling when it is made?” The certificate of the judge includes reference to representation of parties by attorneys, to rulings after argument by attorneys to a written motion, and to the entry of the ruling in the docket; but, as stated, these matters do not seem to be material to the determination of the real question certified. It is a well-known rule of law that rulings of the district court will not be reviewed by this court, unless they were duly excepted to, and the exception must be taken in most cases at the time the ruling is made. Code, sec. 2831. The rule is a most salutary one, designed to promote the administration of justice. Parties should not be permitted to speculate in results by appearing to acquiesce in a ruling until such time as it suits their interest or convenience to question it. They should make known their objections at the time the ruling is announced, or within such time thereafter as is prescribed by due authority. The reasons for the application of the rule in courts of record apply also to justices’ courts. Section 3516 of the Code provides that “the parties to the action may be the same as in the circuit [and district] court, and all the proceedings prescribed for that court, so far as the same are applicable, and not herein changed, shall be pursued in justices’ courts.” It is certainly practicable for a party to a suit in justice’s court to make known his objections to a ruling at the time it is made, and it is due to the court and to the other party that he should do so

Bushnel v. Whitlock.

We are not to be understood as holding that an objection in justice's court must be made as formally, and a record of it made as fully, as would be required in courts of record. That would not be practicable in many cases, and is not required. What we do hold is that a party objecting to a decision rendered in justice's court must in an intelligible manner, and at the time, make his objection known, in order to have the decision reviewed by proceedings in error. In this case the certificate states that the motion to strike was sustained, "after argument by counsel," but it is not shown that counsel for defendant took any part in the argument, nor is it shown that defendant was at the time dissatisfied with the result. The fact that he did not except, nor, so far as is shown, in any manner object, to the ruling, justifies the presumption that it was satisfactory to him when made.

REVERSED.

BUSHNEL V. WHITLOCK *et al.*

Township Trustees: POWERS: SALE OF UNUSED CEMETERY GROUND: CONDITIONS ATTACHED. Township trustees are constituted a board of health, and have charge of all cemeteries within the limits of their township, dedicated to public use, and not controlled by trustees or other corporate bodies,—Code, section 393,—and by section 415 they are empowered to make regulations for the protection of the public health, and respecting nuisances, sources of filth, and causes of sickness in their respective townships. Under these sections, *held* that township trustees, being about to sell ground purchased for cemetery purposes, but which they regarded as unfit to be used for such purpose, could not be enjoined from selling on the ground that they proposed to sell only upon condition that the ground should not be used for a private or public cemetery, and that, upon an attempt to so use it, it should be forfeited back to the trustees and their successors in office.

Appeal from Van Buren District Court.—HON. H. C. TRAVERSE, Judge.

FILED. MAY 10, 1889.

ACTION to restrain the defendants, as trustees of Bonaparte township, from selling certain lands purchased for cemetery purposes, under certain limitations or restrictions. There was judgment for the defendants, and plaintiff appeals.

E. L. Burton and Wherry & Walker, for appellant.

L. A. & L. G. Palmer and Sloan, Work & Brown, for appellees.

GRANGER, J.—Bonaparte township is the owner of the premises in controversy, and the defendants are its trustees. The premises were purchased for use as a public burial ground, but have never been used as such. In July, 1887, the trustees caused the following notice of the sale of said premises to be published: "Bids will be received up to July 25, 1887, for the following tract of land: The southwest quarter of the northeast quarter of the northeast quarter of section 8, township 68, range 8 west, containing ten acres, more or less. By order of the board of trustees of Bonaparte township. Trustees reserve the right to reject any or all bids. If not sold on said day, will be sold at private sale. Bids received by township clerk." Bids were made for the land pursuant to this notice, which were refused, and in August, 1887, the following notice was published by the trustees: "The trustees of Bonaparte township, Van Buren county, Iowa, will sell at public auction, in front of the postoffice in Bonaparte, Iowa, on August 6, 1887, at two o'clock p. m., the following tract of land: The southwest quarter of the northeast quarter of the northeast quarter of section 8, township 68, range 8,—ten acres, more or less, with the following conditions in deed: That the said land, when sold, that it will be so stated in the deed that said land cannot be used for private or public cemetery, and should any attempt be made to use it for a cemetery, the land be forfeited back to the trustees and their successors in office."

Bushnel v. Whitlock.

It is the proceeding to sell under this second notice that is sought to be enjoined. The sole question urged as against the sale is that defendants, in making the sale with limitations or restrictions as to the use of the lands, are acting fraudulently, and against the public interest, and it is urged in argument that they have no legal right to impose the limitations proposed. By section 393 of the Code, township trustees are constituted a board of health, and have charge of all cemeteries within the limits of their township, dedicated to public use, not controlled by other trustees or incorporated bodies. Section 415 gives the trustees power to make regulations for the protection of the public health, and respecting nuisances, sources of filth, and causes of sickness, in their respective townships. We think the foregoing provisions of the law bear indirectly on the question presented in this case. With the concession of appellant in argument that the trustees have the right to sell without restriction, the question does not seem to be a difficult one. The case of *Christy v. Whitmore*, 67 Iowa, 60, involves a controversy as to the same premises, and in that case a *mandamus* was asked to compel the use of the premises for a cemetery, having been purchased by public funds for such a purpose; and this court held that, even though so purchased, it was a question controlled by the discretion of the trustees, they having the unqualified right to determine its fitness for such use. This case is cited only to show the control and authority of the trustees as to its use and suitability therefor. Having the property for sale, and being the conservators of the public health, suppose they should, in the published terms of the sale, provide that such nuisances as affect the public health should not be placed thereon. That right, we think, would not be questioned. It would be in exact accord with their duties as health officers. The law invests them with a discretion as to what is deleterious to public health, and the power to cause its abatement. It seems that after the purchase of these premises for the purpose of a cemetery they were by the trustees regarded as unsuited

Bushnel v. Whitlock.

to such a purpose, and in an effort to sell them they desire to provide against their use as such, and we are not warranted in believing that it is not for some salutary or legal reason. A reason for not using it as a cemetery, in the minds of the trustees, may be that as such it would impair the health of a community, and a purpose of the sale would be to effect a change in location; and, if sold without the restriction, the entire purpose of the sale would be defeated. We think, as a matter of public interest, the trustees should be invested with such a discretion, and it is difficult to see how it could operate to a public disadvantage or injury. Considerable is said in argument as to a fraudulent purpose on the part of the trustees in making the sale. The testimony discloses a condition of affairs certainly not desirable, and we are unable to say just what purposes actuated the trustees in making the change, or placing the restrictions in the terms of sale; but there is no such showing as will justify us in finding their actions fraudulent, and interfering in the discharge of their official duties. This seems to have been the view of the district court on an examination of the testimony, and its judgment is

AFFIRMED.

SPITZMILLER V. FISHER.

Domestic Relations: DAUGHTER WORKING AS MEMBER OF FAMILY: COMPENSATION. Plaintiff, from the age of twenty-two to the age of twenty-eight, was unmarried, and lived with her father, mother and three brothers in the same house, and they were all engaged in market-gardening. At the end of this time the plaintiff was married and ceased to be a member of the family. At this time their joint earnings amounted to about fifteen hundred dollars, which was used in part payment of a farm, the title of which was made to the three brothers, but possession was taken by them together with the father and mother. Afterwards the parents died, and one of the brothers, having bought the interests of the other two, himself died, and plaintiff now claims that part of the money originally put into the land was hers, and she seeks to recover therefor of the administrator of the deceased brother. *Held* that she could not recover, because she failed to show any contract for compensation for her services while a member of her father's family; and, in the absence of such contract, the law presumes that there was to be no compensation, and will grant her none. (Compare *Cowan v. Musgrave*, 73 Iowa, 384.)

Appeal from Des Moines District Court. — HON.
CHARLES H. PHELPS, Judge.

FILED, MAY 10, 1889.

THE defendant is the administrator of the estate of Philip Thoman, deceased. The plaintiff presented a claim for seven hundred dollars against the estate. The defendant denied that anything was due the plaintiff. A trial was had to the court without a jury. There was a judgment for the defendant for costs. Plaintiff appeals.

A. H. Stutsman, for appellant.

T. B. Snyder, for appellee.

ROTHROCK, J.—In the year 1862 the plaintiff, who was then twenty-two years of age and unmarried, lived

Spitzmiller v. Fisher.

in the same house, and as a member of a family composed of herself, her father and mother and three brothers. They were engaged in market-gardening, near the city of Burlington. They continued in that business until 1868, when their joint savings, amounting to some fifteen hundred dollars, were used in part payment for a farm which they purchased, and the conveyance thereof was made to the plaintiff's three brothers, named Philip Thoman, Joseph Thoman and Leo Thoman. The plaintiff married in 1868, and soon thereafter ceased to be a member of the family. The farm was taken possession of by the three sons, and the father and mother, and some time thereafter Philip Thoman purchased the interest of his brothers. The mother resided on the farm until she died, and the father after that continued to live with the son Philip until the latter died. A short time before his death, Philip sold the farm, and at his death was worth about two thousand dollars. Plaintiff was the eldest of the children; Philip was next in age, and was the business manager for the whole family. It will be seen that, if the claim of the plaintiff is to be regarded as an ordinary money demand for work and labor, it has long since been barred by the statute of limitations. It is claimed, however, that though the title to the farm was taken in the name of the plaintiff's brothers, yet that, by reason of having earned a part of the money paid therefor, the plaintiff had a joint interest in the farm, and that the sale of the land, and the appropriation of the money by her brother Philip, was a wrongful conversion of her share of the proceeds of the farm, and that the statute did not commence to run until the money was wrongfully converted. But to sustain this claim it must be made to appear that part of the money which was paid for the farm was in fact and law the money of the plaintiff. This depends upon whether her work and labor were done and performed under an agreement or expectation that she should be paid therefor. If she performed the services without such contract she had no legal claim to the money, nor to

Marriage v. Woodruff.

the land, and, as she was a member of the family composed in part of her father and mother, the presumption is that there was no such agreement or understanding. *Cowan v. Musgrave*, 73 Iowa, 384. The fact that the title to the farm was taken in the name of the three brothers, and was thus allowed to remain for some eighteen years without any claim being made by the plaintiff that she was part owner of it, or the owner of part of the proceeds after it was sold, tends strongly to show that there was no contract nor understanding that she was to be paid for her labor, and fully authorized the district court in so finding. There is no evidence of an expressed contract with reference to the plaintiff's services, and we think the judgment of the district court must be

AFFIRMED.

MARRIAGE V. WOODRUFF.

77	291
139	551

1. **Pleading: FACTS SHOWN BY EXHIBITS.** A petition must be understood as averring the facts disclosed and alleged in the exhibits attached thereto.
2. **Execution: EXAMINATION OF DEBTOR: ARREST UPON ORDER OF REFEREE.** A referee appointed by the court to examine a judgment debtor for the discovery of property in a proceeding auxiliary to execution, under section 8135 of the Code, may issue an order for the appearance of the debtor (sec. 8146), and may afterwards, under section 8148, issue a warrant for the arrest of the debtor, upon the prescribed proofs being made.
8. ——— : ——— : **IMPRISONMENT FOR CONTEMPT : CONSTITUTIONALITY.** Chapter 8 of title 18 of the Code, providing proceedings auxiliary to execution, for the purpose of discovering the property of the execution defendant, is not repugnant to the constitution, in that it provides for the imprisonment for contempt of persons disobeying the order of the court, judge or referee therein, without trial by jury. (*Eikenberry v. Edwards*, 67 Iowa, 619, followed.)

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, MAY 10, 1889.

ACTION to recover damages for an alleged unlawful arrest. A demurrer to the petition was sustained, and, plaintiff refusing to further plead, judgment was entered against her.

John O. Malcolm, for appellant.

Bolton & McCoy, for appellee.

BECK, J.—I. The petition, considered with the exhibits attached thereto, alleges that one Smith was appointed by the judge of the proper district court a referee to take the examination of plaintiff as a judgment debtor in a proceeding auxiliary to execution, pursuant to chapter 3, title 18, of the Code, which requires the judgment debtor in such proceedings to submit to an examination as to his property, or the disposition thereof. It appears from the petition and exhibits that the district court entered an order appointing the referee, and requiring the plaintiff to appear and submit to examination. The petition does not allege directly that the court ordered the plaintiff to appear for examination, but the application for the warrant for the arrest of plaintiff, which is under oath, shows this fact, as also does the warrant issued by the referee. This application and warrant are made exhibits to the petition, as showing the proceedings under which plaintiff was arrested. The petition must be understood as averring the facts disclosed and alleged in these exhibits thereto. The petition further alleges the issuing of a notice by the referee for the appearance of plaintiff, and it is shown by the exhibits thereto that she failed to appear; and the application for her arrest, above referred to, was based on the ground that she was about to depart from the state, and

1. PLEADING:
facts shown
by exhibits.

Marriage v. Woodruff.

thereon a warrant was issued for her arrest, and she was arrested thereon by the defendant, to whom the warrant was delivered for service. It is alleged that the arrest was unlawful, wrongful, and malicious, and on that ground plaintiff bases her claim to recover in her petition. The demurrer to the petition is based upon the ground that the facts alleged in the petition do not entitle the plaintiff to the relief demanded, in that it fails to show that the writ and arrest were illegal, but, on the contrary, shows that both were regular.

II. The plaintiff insists that the warrant was issued without jurisdiction by the referee for, the reason

2. **EXECUTION:** that the statute does not authorize the ref-
examination
of debtor: eree to issue it, such authority being
arrest upon
order of ref- exclusively conferred upon the judge or
eree. court issuing the order for the examination

of the defendant. Code, sections 3135, 3136, provides that an order for the appearance and examination of a defendant may be issued upon certain required proofs being made. Section 3137 provides that the order may be made by the court in which the judgment against the debtor was rendered, or by a judge thereof in vacation, and may require the debtor to appear and answer before the court or judge, or before a referee appointed by the court or judge for that purpose. The following additional provisions are found in the chapter of the Code authorizing the proceeding: "Sec. 3146. The order mentioned herein shall be in writing, and signed by the court or judge or referee making the same, and shall be served in the same manner as an original notice in other cases." "Sec. 3148. Upon proof to the satisfaction of the court or officer authorized to grant the order aforesaid, that there is danger that the defendant will leave the state, or that he will conceal himself, the said court or officer, instead of the order aforesaid, may issue a warrant for the arrest of the debtor, and for bringing him forthwith before the court or officer authorized to take his examination as hereinbefore provided. After being thus brought before the said court or officer, he may be examined in the same manner, and with the like

Marriage v. Woodruff.

effect, as is above provided." The sections previously cited show that a referee may be appointed to take the answer of the debtor. Section 3146 provides that the referee may issue the order for appearance of the debtor, and section 3148 plainly provides that the referee, being authorized to grant the order, may issue a warrant for the arrest of the debtor upon prescribed proofs being made. These sections of the Code plainly declare that a referee appointed by the proper court or judge is authorized to issue a warrant for the arrest of the debtor upon proceedings being had which are prescribed by the statute. It is needless to refer to other sections of the Code cited by counsel for defendant in support of the decision of the court below.

III. It is insisted that, as in the proceeding authorized by the statute in question in this case, the debtor
 a. —: —: is deprived of the right of trial by jury, it
 imprison- is in violation of article 1, section 9, of the
 ment for contempt: constitution of the state, which secures that
 constitution- right. But the contrary was held by a
 ality. majority of the court in *Eikenberry v. Edwards*, 67 Iowa, 619. The argument of counsel for plaintiff fails to satisfy a majority of the court as at present constituted that the decision in that case ought to be overruled.

IV. Code, section 3148, above cited, directs that, in the cases contemplated, a warrant may be issued instead
 4. Same as of the order "for the appearance of the
 number 2, debtor." Plaintiff's counsel insist that, as
 above. the order was made and served on the plaintiff, or a notice of the making of such order was served on her, the referee was not authorized to afterwards issue the warrant; the thought being that after the issuing of the order or notice thereof the referee could do nothing to secure the attendance of the debtor if she refused to appear. But the statute cannot be so construed. In case the debtor refuses in response to the order or notice, must the referee stop proceedings, and thus permit the disobedience of the debtor to defeat the remedy prescribed by the statute? The statute surely means nothing of the kind. The referee, in case

White v. Adams.

of failure of the debtor to obey the order after service thereof, or of a notice of the making of the order, may issue another order or notice directed to the debtor. But the statute provides that "instead of the order," *i. e.*, in its place, a warrant may be issued upon a showing made as prescribed by the statute. No other questions arise in the case. In our opinion, the decision of the district court must be **AFFIRMED.**

WHITE V. ADAMS.

1. **Contract: GOODS MADE TO ORDER: DEFENSE: PLEADING.** Action for the price of certain patterns alleged to have been made for and delivered to defendant upon his order. Defendant answered that "said patterns were not reasonably fit and proper for the purpose for which plaintiff made them, and were not reasonably fit and proper for use in defendant's business," and were not in shape, form and style as requested by defendant. Plaintiff moved to strike out that portion of the answer enclosed in quotation marks above, but the motion was overruled. *Held* no error, though the court instructed the jury that the only question of fact was, Were the patterns made as ordered by defendant?
2. **Practice: OPENING AND CLOSING.** The question as to who has the burden of proof, and the right to open and close, is a matter of practice, and the ruling of the trial court thereon will not be reviewed unless there is proof of an abuse of discretion. (See *Viele v. Insurance Co.*, 26 Iowa, 9.)
3. **Evidence: NOT RELEVANT TO ISSUE.** Where a case turns upon one single question of fact, evidence not relevant thereto is properly excluded.
4. **Instructions: SPECIAL INTERROGATORIES: WHEN PROPERLY REFUSED.** Special interrogatories submitting questions not relevant to the issue are properly refused, and so are such as call for an answer to the ultimate fact in issue. (See opinion for application of rule.)
5. — : **AS TO BURDEN OF PROOF: CONFLICT.** The court, having clearly instructed the jury that the burden of proof was upon the defendant, told them in the next instruction that the only question was, Were the patterns made as ordered by defendant? and then proceeded to say: "If you find by a fair preponderance of the evidence that they were so made, then your verdict should be for the plaintiff, but if not, then your verdict should be for defendant." *Held* that, taking the instructions together, the jury must have clearly understood that the burden was on defendant to show that the patterns were not made as ordered by him, and therefore there was no substantial conflict.

77	295
90	400
77	295
101	529
77	295
112	702
77	295
114	827
77	295
122	236
77	295
125	638
77	295
138	211
1138	667

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, MAY 10, 1889.

THIS action was originally brought against A. G. Adams, and, upon his death being suggested, F. O. Adams, administrator, was substituted as defendant. Trial to a jury. Verdict for defendant. Plaintiff appeals. The facts appear in the opinion.

Power & Huston, for appellant.

C. L. Poor, for appellee.

GIVEN, C. J.—I. The plaintiff seeks to recover \$107.25 for certain patterns for boots in the quantities, sizes and styles, and for the price, specified in an itemized account, alleged to have been manufactured at the instance and request of the defendant, and delivered to him, and to be reasonably worth the price charged. The defendant admits that he requested plaintiff to manufacture and ship to him certain boot patterns, in number and general description as specified, to be used in defendant's business, and that the plaintiff did ship the goods specified in the petition. The defendant says that said patterns were not reasonably fit and proper for the purpose for which plaintiff made them, and were not reasonably fit and proper for use in defendant's business, and were not in shape, form and style as requested by defendant; wherefore they were of no value, and were returned to the plaintiff.

II. The plaintiff moved to strike from the answer the allegation that the patterns "were not reasonably fit and proper for the purpose for which plaintiff made them, and were not reasonably fit and proper for use in defendant's said business," which motion was overruled, and which ruling is assigned as error. There was no error in this ruling. The petition asked to recover for

1. CONTRACT:
goods made
to order; de-
fense: plead-
ing.

 White v. Adams.

boot patterns manufactured and delivered at the instance and request of the defendant. It is a good defense to such a claim that the article furnished was not reasonably fit for its intended purpose. It appeared on the trial that the defendant, having tested certain models for boot patterns made by the plaintiff, sent the models to the plaintiff from which to make the patterns sued for. The plaintiff claims to have made them according to the model, while the defendant claims that they were not so made, and hence the court properly instructed the jury that the only disputed question of fact is, "Were the patterns made as ordered by the defendant?" Even upon this single issue the motion was properly overruled. The law is: "Where an article of a certain and definite nature is to be manufactured to order, the seller, of course, can in no sense be considered as warranting it to be appropriate to the use to which the buyer intends to apply it, but only to be as fit as any similar article complying with the order can reasonably be expected to be; that is, the seller does not warrant the judgment of the buyer in ordering such an article for such a use, but only the fitness of the article, as far as its quality is concerned. * * * But if the skill and judgment of the maker be relied upon, and he be requested to make a machine adapted to a particular purpose, the manufacturer would be bound to supply an article reasonably fit to accomplish such purpose." 2 Story, Cont., sec. 1075.

III. On the trial the defendant was allowed the opening and closing, to which the plaintiff excepted. The question as to who has the burden of proof is properly a matter of practice, and the ruling of the court thereon will not be reviewed, unless there is evidence of an abuse of discretion. *Viele v. Insurance Co.*, 26 Iowa, 9. There was no abuse of discretion in allowing the opening and closing to the defendant.

IV. The plaintiff offered in evidence a certain letter from himself to defendant, to which defendant objected,

2. PRACTICE :
opening and
closing.

2. EVIDENCE:
not relevant
to issue.

and the objection was sustained to the part thereof which says: "It would be my advice to you to have this order of patterns made up the regular way. It will not be much expense to have them changed over for the machine." As the case turns entirely upon the single question of fact, already stated, this part of the letter, and, indeed, the whole letter, was immaterial.

V. The plaintiff requested the court to submit the following special findings, which were refused, to-wit:

4. INSTRUCTIONS:
special inter-
rogatories:
when properly
refused.

First. Were the paper models by which the plaintiff cut the patterns made under and in accordance with the instructions of A. G. Adams, given by himself, or his agent, F. O. Adams? *Second.* Were the patterns in controversy made by plaintiff in accordance with the paper models, cut by plaintiff under the instructions of A. G. Adams, or his agent, F. O. Adams? The only question submitted to the jury being: "Were the patterns made as ordered by the defendant?" the first special interrogatory was immaterial. There was no question made to the jury but that the models were in accordance with directions. The question was as to the patterns. Immaterial questions should not be submitted to the jury. *Bonham v. Insurance Co.*, 25 Iowa, 328. The second question calls for an answer as to the ultimate fact,—were the patterns made by the plaintiff in accordance with the paper models? To answer this either in the affirmative or negative would be a complete determination of the case. It is a request for a special verdict, as provided for in section 2807 of the Code, rather than for an answer to a special interrogatory, as provided for in section 2808. It is in the discretion of the jury whether the verdict should be general or special, and the provision in regard to special interrogatories does not apply. There was no error in refusing to submit these questions to the jury.

VI. It is claimed that the first, second and eleventh instructions given by the court are in conflict as to the

Thomas v. McDanel.

5. —: as to
burden of
proof : con-
flict.

burden of proof. In the first instruction the court says: "Under these pleadings, the burden is upon the defendant to establish his defense by a fair preponderance of evidence, and if he does this your verdict should be for him, but if he fails in this, then your verdict should be for the plaintiff." In the second, after telling the jury that the only question is, "Were the patterns made as ordered by the defendant?" they are told: "If you find by a fair preponderance of the evidence that they were so made, then your verdict should be for the plaintiff, but, if not, then your verdict should be for the defendant." Taking the instructions together, it must have been clear to the minds of the jurors that the burden was on the defendant to show that the patterns were not made in accordance with the models. The seventh and eighth instructions are in accordance with the law as stated above, and were properly given to the jury. There being no error in either of the respects assigned, and the verdict being fully sustained by the evidence, there was no error in overruling the plaintiff's motion for new trial, nor in rendering judgment for the defendant for costs.

AFFIRMED.

THOMAS V. MCDANELD *et al.*

Injunction : ATTORNEY'S FEES FOR DEFENDING : RECOVERY IN ACTION ON BOND. Expenses necessarily incurred for attorney's fees in defending against an injunction wrongfully sued out may be recovered in an action on the injunction bond, but such damage does not include expenses in defending against other features in the case in which the injunction was issued. And although, as in this case, the prayer is for an injunction, "and such other and further relief as petitioner is entitled to," yet if the allegations of the petition do not entitle the plaintiff to any other relief than injunction, and the injunction is dissolved on final hearing, the injunction defendant may recover his attorney's fees in an action on the injunction bond. (Compare *Langworthy v. McKelvey*, 25 Iowa, 49, and *Carroll County v. Railroad Land Co.*, 53 Iowa, 685; also *Lansley v. Nietert*, *post*, p. —.)

77	999
78	759

77	299
88	375

77	299
85	557

77	299
101	484

77	299
132	18

77	299
143	511

Thomas v. McDaneld.

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, MAY 10, 1889.

ACTION upon an injunction bond. There was a trial to a jury, and on motion of defendant the court directed a verdict for the defendant, to which plaintiff excepted. Plaintiff appeals.

The court makes the following finding of facts: That September 17, 1888, Hannah O. McDaneld brought her action in equity against George W. Burnside, sheriff of Linn county, and John Thomas, in which she stated that she was the unqualified owner of certain real estate described, including lot 3, in block 4, Marion, Iowa; that Burnside, as sheriff, had levied upon, advertised, and was proceeding to sell said real estate, unless restrained, upon an execution on a judgment in favor of John Thomas and against T. J. McDaneld; that, if sold, it would cast a cloud and pretended lien upon the premises; that she had no other speedy or adequate remedy at law, and therefore asked "that a temporary writ of injunction be granted to enjoin the sheriff from selling said premises, and, on the hearing of said case, that the injunction be made perpetual, and for such other and further relief as petitioner is entitled to;" that a temporary writ was ordered upon the filing of the bond; that said Hannah O. McDaneld, with J. H. Hoagland as surety, executed the bond sued upon, which is conditioned that Hannah O. McDaneld will pay all damages which may be adjudged against her by reason of said injunction; that the defendants in said case answered said petition, averring that the land described, at the time it was levied upon, was in fact the land of T. J. McDaneld; that previous to said levy said lands had been conveyed by T. J. McDaneld to Hannah O. McDaneld, without any consideration whatever, and with intent to hinder and defraud the creditors of T. J. McDaneld; that T. J. McDaneld was then

Thomas v. McDaneld.

indebted to John Thomas to the amount of the judgment, upon which an execution was issued, and that said judgment was a lien upon said lands; that afterwards the defendants filed an amended and substituted answer, in which they deny that the plaintiff was the full and unqualified owner of the property described in the petition, and averred that said lot 3 is and was, at the time of the levy, the property of T. J. McDaneld; that at the March term, 1888, a decree was rendered and entered in said case wherein the court did "order and adjudge and decree that the equity of said case is with the defendants upon their said amended and substituted answer, and that said lot 3, in block 4, in Marion, Iowa, was the property of T. J. McDaneld at and prior to the levy of the execution against said T. J. McDaneld, referred to in the plaintiff's petition, and liable to be sold upon said execution as the property of said T. J. McDaneld; and the court doth order and adjudge and decree, that so far as the writ of injunction restrained defendant from advertising and selling said lot 3, block 4, Marion, Iowa, the same be released and dissolved, and said petition thereto be dissolved as to the said lot 3, block 4, Marion, Iowa, and that plaintiff pay costs."

The court further certifies that the plaintiff, John Thomas, brought this action on said bond to recover one hundred dollars damages for the wrongful suing out of said writ, and restraining the sale under said execution, alleging that by reason thereof he was put to great trouble and expense in defending against same, and that, in order to procure a dissolution of said injunction, he was compelled to and did employ an attorney to defend the suit, and became obligated and liable to pay therefor the sum of one hundred dollars; that issue was joined upon said petition and the parties proceeded to trial, the defendants claiming that said injunction was auxiliary to the main issue—the title—in the former case, and that no motion was made to dissolve the same, but that the same was dissolved upon the final hearing upon the merits; that it appeared on

Thomas v. McDanel.

the trial that Henry Rickel was employed by John Thomas, and appeared as his attorney, and defended said equity case, and that his services were reasonably worth seventy-five dollars.

The following question is certified to this court for decision: "On such state of facts as appear by the foregoing, did the court err in directing the verdict of the jury for the defendants?"

Rickel & Crocker, for appellant.

Davis & Voris, for appellees.

GIVEN, C. J.—I. It will be observed that the only damage claimed is for expenses incurred for attorney's fees, and that the only service rendered by the attorney was in answering the petition in equity, and in defending the case on the final hearing. It is well established by repeated decisions of this court that expenses necessarily incurred for attorney's fees in defending against an injunction may be recovered in an action on the injunction bond. Such damage, however, does not include expenses in defending against other features of the case in which the injunction was issued. In *Langworthy v. McKelvey*, 25 Iowa, 49, the court says: "If a case should arise where the injunction was dissolved after a hearing on the merits, and this was the only relief sought, and all there was in the case, we are not to be understood as holding that counsel fees might not be recovered. In other words, we do not hold that such recovery is to be confined alone to cases where the injunction is dissolved on motion."

The sole question before us is whether the services rendered in answering the petition and defending on the trial were services in defending against the injunction. This depends upon whether the case was an independent proceeding for injunction alone, or whether the injunction was a mere auxiliary to a proceeding for other relief. The relief asked was that the sale be enjoined, "and for such other and further relief as

Briggs v. McEwen.

petitioner is entitled to." The allegations of the petition did not entitle the petitioner to any other relief than injunction. Strike the prayer for injunction and the allegations upon which it is asked from the petition, and there is no case left. In *Langworthy v. McKelvey*, *supra*, and in *Carroll County v. Railroad Land Co.*, 53 Iowa, 685, the court held that the injunction was only auxiliary to the other relief asked. True, the relief asked in this case depends upon the question of title, but that does not change the fact that it is an independent proceeding for injunction only. Being for injunction only, there is nothing else in the case to defend against. Had a motion been made to dissolve this injunction, it would have involved the same investigation that was made on the trial; and, had such motion been made and sustained, the case would have been finally disposed of as provided in section 3401, Code, as there would have been nothing left to proceed upon. The case was one for injunction alone, and what was done in the way of defense was against the injunction, and resulted in its dissolution. We hold, under the facts certified, that the plaintiff was entitled to recover his expenses for attorney's fees necessarily incurred in defending the case in equity, and that the court erred in directing the jury to find for the defendants.

REVERSED.

BRIGGS V. MCEWEN.

1. **Replevin: DEFENDANT NOT IN POSSESSION: EVIDENCE.** In an action of replevin, defendant asked the court to direct a verdict for defendant on the ground that the uncontroverted evidence showed that the property was not in defendant's possession when the suit was begun; but the only evidence tending so to show was defendant's statement that in dividing his property, long after he had refused to deliver the team in question to plaintiff on demand, his son got it. *Held* that the court rightly refused to direct a verdict for defendant.

77	303
89	204

77	303
f139	586

Briggs v. McEwen.

2. **Sale: CONDITIONAL: GARNISHMENT OF VENDEE.** Where a sale is made on condition that the title shall not pass until payment is made, and the property is delivered before payment, and the vendee is garnished as the debtor of the vendor, and therefore refuses to pay, there is no sale, and the garnishment is no defense to an action by the vendor to recover the property.
3. **Special Interrogatory: SUBMISSION TO COUNSEL.** Special interrogatories submitted on the court's own motion need not be submitted to the inspection of counsel. (See *Clark v. Ralls*, 71 Iowa, 189.)

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

FILED, MAY 11, 1889.

THIS is an action to recover a certain team of horses, the plaintiff alleging that he was the absolute and unqualified owner thereof by purchase; that the defendant wrongfully detained the same from him, claiming to have purchased the same from plaintiff. The defendant answered, denying generally, and alleging that he had purchased the team, and took possession thereof under delivery made to him by the plaintiff, and that thereafter, and before the commencement of this suit, he was garnished at the suit of S. N. Dale v. C. I. Briggs; that he had answered in said garnishment suit, showing an indebtedness of three hundred and sixty-five dollars to Briggs, and that the said suit was then pending. The plaintiff in reply alleges that defendant agreed to take the team at three hundred and seventy-five dollars; that plaintiff refused to deliver the team until purchase money was paid, and it was agreed that defendant would then pay ten dollars, and would meet plaintiff at Woodbine, and pay him the balance on the next day, plaintiff to leave the team at defendant's premises between plaintiff's home and Woodbine; that it was distinctly agreed that the team remain the property of the plaintiff until the balance of the purchase money was paid, and, if the purchase money was not paid, the team was to be returned to plaintiff on demand, defendant to have no right, title or interest in said team, nor was said purchase

Briggs v. McEwen.

to be considered consummated until such time as plaintiff received the purchase price; that plaintiff met defendant next day, and he refused to pay, and afterwards the plaintiff tendered back the ten dollars received by him, and demanded the team, which defendant refused to deliver. The case was tried to a jury. Verdict and judgment for plaintiff. Defendant appeals, assigning as errors the refusal of the court to give certain instructions asked, and in submitting a special finding, and in overruling the motion for new trial.

The instructions asked were as follows: “(1) The uncontroverted evidence shows that at the time this action was commenced the defendant was not in possession of the property. You will therefore find for the defendant. (2) If the testimony shows that, at the time this action was commenced, the defendant did not have possession of the property, then your verdict should be for defendant. (3) If the property was sold on condition that it should not pass to defendant until it was fully paid for, and you further find that defendant was ready to pay, and was only prevented from doing so by the garnishment, then the law will consider the payment as made, and your verdict should be for the defendant. (4) Where the agreement is that property is to be paid for in cash on delivery, and the property is delivered, the sale is complete; whether the payment is made or not. Therefore, if the testimony shows in this case that the team was to be paid for on delivery, and you find they were delivered, your verdict should be for the defendant. (5) Defendant sets up, by the way of plea in bar and abatement of this action, that prior to the same he was garnished for the proceeds of the property. It is shown by the record that such is the fact, and that such garnishment proceeding is now pending; therefore your verdict should be for the defendant.”

It appeared by the uncontroverted testimony that plaintiff and defendant did have an agreement for the sale of the horses in controversy by plaintiff to defendant at the price of three hundred and seventy-five

Briggs v. McEwen.

dollars; that defendant paid to plaintiff ten dollars; and that it was agreed that he would pay the balance at Woodbine on the next day, plaintiff to leave the horses at defendant's farm, where his son lived, on the next day, on his way to Woodbine, where the money was to be paid; that he did so leave the horses on the next day, and that before payment of the money the defendant was garnished as a supposed debtor of the plaintiff at the suit of one Dale, for which reason he refused to pay the plaintiff; whereupon plaintiff tendered back the ten dollars, and demanded the team, which the defendant refused to return.

Sanford H. Cochran, for appellant.

H. H. Roadifer and Bolter & Sons, for appellee.

GIVEN, C. J.—I. The main question to be determined in this case was whether the sale was upon condition that title should not pass to the defendant until payment was made, or, in the language of the special interrogatory submitted to the jury: "Was the sale of the team in controversy made on condition that cash was to be paid before title passed?" The jury answered this special interrogatory in the affirmative,—an answer which is fully sustained by the evidence.

II. There was no error in refusing the instructions asked. The only testimony tending to show that the

defendant was not in possession of the team at the time the suit was commenced was his statement that, in dividing his property,

1. REPLEVIN:
defendant not
in possession:
evidence.

between the tenth and fifteenth of May, his son got the team. This was long after the demand for and refusal to return the team, and such mere colorable possession could not defeat the action. The third instruction was properly refused, because, if the sale was on condition

that title should not pass until full payment was made, defendant could not be garnished so as to defeat that condition. In that case

2. SALE: con-
ditional:
garnishment
of vendee.

the property did not pass until payment, and until it passed there was no indebtedness. The fourth does

Cole v. Green.

not state the law correctly. Where the agreement is that the property is to be paid for in cash on delivery, and the property is delivered, the sale is not complete until payment is made. The garnishment of the defendant was not a bar or defense to this action, if the sale was on the condition claimed and found, and, if not upon that condition, the plaintiff was entitled to recover; hence there was no error in refusing the fifth instruction asked.

III. The abstract fails to show that the special finding was submitted at the request of the counsel for plaintiff, or without the knowledge of the counsel for the defendant. If submitted by the court on its own motion, as we may presume from the record it was, it is not required that it be submitted to the inspection of counsel. *Clark v. Ralls*, 71 Iowa, 189. There was nothing in the special finding that tended to lead the mind of the jury from other issues, or mislead them.

IV. The verdict is in accordance with the law as given by the court, and fully sustained by the evidence. Finding no error in either of the respects assigned, the judgment of the district court is

AFFIRMED.

COLE V. GREEN.

Chattel Mortgage : DEFECTIVE DESCRIPTION : GOOD AS TO SHERIFF HAVING ACTUAL NOTICE. The defendant in this case, as sheriff, levied upon a stock of goods upon which the plaintiff held a chattel mortgage. The goods were described in the mortgage as being on a certain lot and block, but were not otherwise located. *Held* that, though this description was so indefinite that the recording of the mortgage would not impart constructive notice to the sheriff, yet, as he had actual notice, through his deputy, who levied the attachment, the mortgage was valid as against him, and he could not hold the goods.

Appeal from O'Brien District Court.—HON. C. H. LEWIS, Judge.

FILED, MAY 11, 1889.

P. R. Bailey, for appellant.

Alfred Morton and O. M. Barrett, for appellee.

GIVEN, C. J.—I. The plaintiff, F. G. Cole, brings this action to recover the possession of certain chattel property from the defendant, W. C. Green, sheriff, who took the same under an attachment as the property of George Wall. The plaintiff claims the property by virtue of a chattel mortgage from Wall to him. The parties waived a jury, and the case was submitted to the court, and judgment entered against the defendant, and defendant appeals, assigning as errors: *First*, that the court erred in rendering judgment against the defendant, for the reason that there was no notice to defendant of the existence of said mortgage upon the stock of goods, either actual or constructive, prior to the levy of the attachment; *second*, that the court erred in rendering judgment against the defendant for the reason that the evidence shows that the mortgage given by Wall to Cole was fraudulent, and given for the purpose of aiding Wall to defraud his creditors, and was without consideration; *third*, that said mortgage did not impart notice of record, for the reason that the same was void for want of proper description and location. The mortgage is upon "all my restaurant stock, consisting of candies," etc., describing the property particularly, "now, in use in said restaurant, which is located on lot number 15, in block 13." There is no other location given. The judgment shows that the court found that the defendant sheriff, through his deputy, who levied the attachment, had actual notice of the existence of the mortgage prior to the making of the levy, and this the court might very properly have found from the testimony, though there is conflict with

Preston v. Hull.

regard to it. "The mortgage, which is so indefinite as to the description of property that the record thereof would not constitute sufficient notice to a purchaser, may nevertheless be valid between the parties who are aware of the facts." *Clapp v. Trowbridge*, 74 Iowa, 550. It follows that, the defendant having actual notice of this mortgage before making the levy, the mortgage is valid as to him, notwithstanding its defective description of the property. This being the case, it is immaterial as to these parties whether the mortgage had been recorded or not. The court found that the mortgage was not fraudulent. This finding is not without support in the testimony, and under the well-settled rule we cannot interfere with it. The judgment of the district court is

AFFIRMED.

PRESTON V. HULL.

77	309
j144	18

Water: DIVERSION: RIGHTS OF ADJOINING OWNERS: PRESCRIPTION.

Where one of two adjoining owners of land turns the water from his land, whether it be mere surface water or not, upon the land of his neighbor, he does not, by the mere use of the water in that way for ten years, acquire the right to continue to so use it (see Code, sec. 2031, and cases cited in opinion), and he cannot complain if his neighbor seeks to protect his land by draining the water to a point where it may possibly flow back again upon the land of him who first diverted it.

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

FILED, MAY 11, 1889.

THE plaintiff and defendant are owners of adjoining farms. This is an action in equity, by which the plaintiff seeks to enjoin the defendant from making a ditch upon defendant's land, which it is alleged will cause water to flow on the plaintiff's land, to his injury.

Preston v. Hull.

There was a trial upon the merits, and a temporary injunction which had been granted was dissolved, and the petition dismissed. Plaintiff appeals.

S. H. Cochran, for appellant.

C. MacKenzie and *J. H. Smith*, for appellee.

ROTHROCK, J.—The parties each own eighty acres of land. The line between their farms runs east and west, and the plaintiff owns eighty acres south, and the defendant the tract north, of the line. A stream of water enters plaintiff's land from the east, near the northeast corner, and runs a short distance in a westerly direction, and curves to the north across the line, and then in a southwesterly direction, to a culvert in the Chicago and Northwestern Railroad, which crosses the western part of the two tracts in a southwesterly direction. The defendant commenced cutting a ditch from the stream on his own land, and near the line, due west to the railroad right of way. The plaintiff objected to this, on the alleged ground that if the ditch should be completed the water would flow therein to the railroad, and then back on the west part of plaintiff's land, to his injury. Both parties concede that the owner of agricultural lands has no right to collect surface water on his own land, and discharge it in a body upon the adjoining land, to the injury of the owner. The plaintiff contends that it is not mere surface water, but that it is a natural stream, with well-defined banks and channel. The defendant's contention is that it is immaterial whether it is a natural stream or mere surface water. He claims that he has the right to cut the ditch and discharge the water on the railroad right of way, even if by flowing back it may injure the plaintiff's land, because the plaintiff wrongfully diverted the water from his own land on the defendant's land in the first instance, and the defendant has the right to turn it back. The principal contention in the case is, which is the dominant and which the servient estate? or, in other words, if the water as it enters plaintiff's land

Preston v. Hull.

had been left free to flow upon the natural surface, would it have crossed the line, and over upon the land of the defendant? Upon this question of fact, and upon the question as to the plaintiff's alleged interference with the natural course of the water, whereby it was turned upon the defendant's land, a large number of witnesses were examined. The taxable costs of the case in the district court amounted to nearly four hundred dollars.

It is apparent from this statement that we cannot review the evidence. We will state the facts which, in our opinion, should be considered as established by the testimony. The stream of water which is the cause of all the contention and trouble is of recent origin. Some twenty years ago, before the land was brought under cultivation, and when nearly all the adjacent country was in a state of nature, there was a low swale or slough which entered the plaintiff's land at the point where it is now claimed there is a natural stream. The bottom of this slough or depression was then covered with grass. In times of rain the water flowed over it in a stream. A very decided weight of evidence is that the water did not then flow across the line and onto defendant's land. It is true that at times of flood the water may have spread upon defendant's land, but actual levels show that the natural flow was over the plaintiff's land to the southwest. The plaintiff improved his land some twenty years ago. The defendant did not improve until later. The water in the slough was a source of trouble to the plaintiff. He plowed and scraped in the slough on his own land. He and his witnesses claim that this was only for the purpose of straightening the bed of the stream. But we think the preponderance of the evidence is that this was done to prevent the water from flowing in a southwesterly direction over his land. Indeed, we think it is fairly shown that he, by the use of boards and banks of earth, turned the water upon the defendant's land. If this be correct,—and, as we have said, we think the evidence fairly establishes it,—the defendant

Preston v. Hull.

would have had the right then and there, and no matter whether the water should be regarded as mere surface water or a natural stream, to erect an embankment or dike across the course of the water, and thus keep it off his land. But the plaintiff contends that, even if it be true that by making barricades of boards, and plowing and scraping, he changed the flow of water from his land to defendant's, the acts were done more than ten years before this action was commenced, and that he has by lapse of time acquired the right to the flow of water as it now is by adverse right or prescription. We do not think this position is sound. The right thus acquired would be in the nature of an easement. Section 2031 of the Code is as follows: "In all suits hereafter brought in which title to any easement in real estate shall be claimed by virtue of adverse possession of the same for the period of ten years or by prescription, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be proved by evidence distinct from and independent of the use, and that the party against whom the claim is made had express notice thereof, and these provisions shall apply to public as well as private claims." It is not claimed that there had been adverse use of the flow of water for ten years prior to the enactment of the Code, and there is no evidence other than the mere use that the defendant, or those under whom he claims, had express notice that the claim was adverse. Under this provision of the law and the decisions of this court, the plaintiff acquired no right to continue the flow of water on the defendant's land. See *State v. Mitchell*, 58 Iowa, 567; *Zigefoose v. Zigefoose*, 69 Iowa, 391; *State v. Birmingham*, 74 Iowa, 407. Having found that the plaintiff should have taken care of the water which came upon his land from the east, he is in no position to complain of the defendant for cutting a ditch and conducting the water on the railroad right of way. If he had awaited the completion of the ditch to the railroad right of way, and

 Batie v. Allison.

then found that he was injured by water being cast back upon his land, he could have, by a ditch or drain, conducted it southwest, to a culvert in the railroad near the Boyer river. Our conclusion is that the decree of the district court should be **AFFIRMED.**

BATIE V. ALLISON.

77	313
112	281
77	313
116	877

Vendor and Vendee: SPECIFIC PERFORMANCE: ACCEPTANCE NOT IN TERMS OF OFFER. Specific performance will not be decreed where there is uncertainty, ambiguity or doubt respecting the contract. (See opinion for authorities.) And so, where defendant wrote to plaintiff: "Will give a warranty deed as title now stands at eight dollars per acre net to me," and plaintiff replied: "We accept your offer without qualification. * * * Notify us when and where to send money. We understand, of course, that you have L.'s title, and that you will place the same on record," *held* that the acceptance was not an unconditional one in the terms of the offer, and therefore that there was no contract to be enforced. (Compare *Sawyer v. Brossart*, 67 Iowa, 678.)

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MAY 11, 1889.

THE facts appear in the opinion.

Mason & Thomas, for appellant.

Murphy & Fort, for appellee.

GIVEN, C. J.—The plaintiff filed his petition, asking specific performance of an alleged contract of purchase and sale of certain real estate. He set out and makes a part of his petition certain letters, which it is claimed constitute the contract sought to be enforced. The defendant demurred to the petition, which demurrer was sustained, and, the plaintiff electing to stand upon

Batie v. Allison.

his petition, judgment was entered dismissing the same, and for costs; to which the plaintiff excepted, and from which judgment he appeals.

The only question raised by the demurrer is whether the letters set out as part of the petition show such an offer and acceptance as to constitute a contract between the parties. The relief asked is that a decree be entered requiring the defendant to execute a warranty deed to the plaintiff for the lands described, and, in case defendant is unable to do so, that plaintiff have judgment for eight hundred dollars damage. It is a well-settled rule in equity that specific performance will not be granted when there is an uncertainty, ambiguity or doubt respecting the contract. *McDaniels v. Whitney*, 38 Iowa, 60, and authorities therein cited. To be entitled to specific performance, therefore, the petition should show a contract wherein there is no uncertainty, ambiguity or doubt. An offer by one party, assented to by the other, will generally constitute a contract; but the assent must comprehend the whole of the proposition. It must be exactly equal to its extent of terms, and must not qualify them by any new matter. The proposal to accept, or the acceptance of an offer on terms varying from those proposed, amounts to a rejection of the offer. *Baker v. Johnson County*, 37 Iowa, 186. But, as stated in *Goodenow v. Barnes*, 40 Iowa, 561: "An acceptance, in order to bind the parties, must be unequivocal and unambiguous. * * * The language of the acceptance should be such as would leave no avenue of escape for the party using it from the obligation of a contract based upon the proposition and acceptance. The contract, to be binding, must be mutual. If the acceptor does not bind himself by the language of the acceptance, no contract will be created binding the other party."

The letter (Exhibit B) relied upon as constituting the offer reads: "Will give a warranty deed as title now stands, at eight dollars per acre net to me. Have no desire to try and get bottom title." This last remark refers to an inquiry in the preceding letter—"Can you

Batie v. Allison.

not unite a government title with Lash's tax title? The government title seems to be in Jerome Bonham." The letter (Exhibit C) relied upon as constituting the acceptance reads: "We accept your offer without qualification, for sale of S. E. fourth 31—87—35. Make deed to William F. Batie, and notify us when and where to send money. We understand, of course, that you have Lash's title, and that you will place the same on record." The whole of the proposition was "to give a warranty deed as title now stands, at eight dollars per acre net to me."

Is Exhibit C an unqualified acceptance of the whole of the proposition, or does it qualify the proposition by any new matter? Though it says, "We accept your offer without qualification," it is clearly with the understanding and upon the condition "that you have Lash's title, and that you will place the same on record." The offer expressed nothing as to time or place of payment, and, had the acceptance been without expression on that subject, the law would fix the time and place; but the acceptance is upon condition that defendant would "notify us when and where to send the money."

In *Sawyer v. Brossart*, 67 Iowa, 678, the offer was from Brossart, residing at Los Angeles, California, for property in Iowa City, and the response was from Sawyer at Iowa City. The offer was: "You can have the building for \$3,500, or the two for five thousand dollars." The acceptance was: "Accept your offer for two buildings at five thousand dollars. Money at your order at First National bank here. Telegraph me immediately when to expect the deeds." This was held not to be an acceptance of the offer; that it was coupled with a condition with which Brossart was not required to comply. It was Sawyer's duty to pay the money to Brossart. It was a direct offer, and required an acceptance in the terms of the offer. Brossart's offer entitled him to have the money paid and deed delivered to him at Los Angeles.

Cherokee & Dakota Ry. Co. v. Renken.

It is claimed that, if there were qualifications expressed in Exhibit C, that then became a proposition, and that Exhibit C, with such qualifications, was accepted by the defendant. We do not think the correspondence exhibited will bear such construction. We are clearly of the opinion that the petition fails to show such an acceptance of any offer made as constituted a contract; certainly not a contract so free from uncertainty, ambiguity or doubt as that equity will enforce it. The judgment of the district court is

AFFIRMED.

THE CHEROKEE AND DAKOTA RAILWAY COMPANY *et al.*
v. RENKEN.

Railroads: PROMISE OF RIGHT OF WAY: QUIETING TITLE: EVIDENCE.

The evidence in this case shows that, before plaintiff's road was built over defendant's land, defendant promised that he would give the right of way therefor. While the road was not located relying upon this particular grant of right of way, it appears that the securing of the right of way generally was a condition to its location. *Held* that a decree quieting the title thereof in plaintiff was justified by the facts.

Appeal from Lyon District Court.—HON. GEORGE W.
WAKEFIELD, Judge.

FILED, MAY 11, 1889.

ACTION to quiet title to the right of way over certain lands belonging to the defendant. There was a decree for the plaintiff and defendant appeals.

Van Wagenen & McMillen, for appellant.

J. M. Parsons, for appellee.

GRANGER, J.—The plaintiff, in 1887, constructed a line of railroad from Cherokee, Iowa, to Sioux Falls, Dakota, which line crossed the lands of the defendant,

Courtright v. The Singer Manuf. Co.

the right of way over which is in question. The main controversy is as to whether or not, before the construction of the road, the defendant agreed that, in consequence of the building of the road, he would give the right of way. As we view it, the case involves simply this question of fact. The testimony is short. Prior to the location of the road, and while its location was doubtful, about Sheldon and points in Lyon county there was considerable anxiety to secure it. Committees were appointed with a view to secure the right of way as a condition upon which the road might be located. The defendant was interviewed by one of the plaintiffs, who testifies that he said to him that he would not then sign a contract to give the right of way, but that he would give it. Huntington, Smith and Brown each testify that defendant said he would give the right of way if the road was built. While it does not appear that the road was located relying upon this particular grant of right of way, it does appear that the securing the right of way generally was a condition to its location. Opposed to this testimony is that of the defendant alone, in which he denies having agreed to give the right of way. It is unnecessary to discuss the evidence. It is sufficient to say that it largely predominates in favor of the plaintiff, and the judgment below is

AFFIRMED. .

77 317
1110 87

COURTRIGHT V. THE SINGER MANUFACTURING COMPANY.

1. **Appeal: LESS THAN \$100: WHEN CERTIFICATE MUST BE SIGNED.** Where a motion for a new trial was ruled upon at ten o'clock a. m., and a request was then made for a certificate for an appeal, but the certificate was not signed by the judge until three o'clock p. m. of the same day, *held* that it was not too late.
2. **Attachment; JUDGMENT BY DEFAULT: ACTION ON BOND FOR WRONGFUL SUING OUT.** A judgment by default for plaintiff in an attachment case, upon personal notice to defendant, is not necessarily a bar to a subsequent action on the attachment bond for the wrongful suing out of the writ. It depends upon the grounds upon which it is claimed the attachment was wrongful.

Appeal from Keokuk Superior Court.—HON. HENRY BANK, JR., Judge.

FILED, MAY 11, 1889.

Craig, McCrary & Craig, for appellant.

W. J. Roberts, for appellee.

GIVEN, C. J.—I. This case comes before this court on certificate of the judge trying the same. Appellee moves to dismiss the appeal, because the certificate was not signed at the time of the overruling of the motion for new trial. The certificate shows that the motion was ruled on at ten a. m., when a request was made for a certificate, and that the certificate was signed by the judge at three p. m. of the same day. This is within the rule as several times announced by this court. *Fallon v. District Tp. of Johnson*, 51 Iowa, 206.

II. The judge certifies the following question for the opinion of this court: "Is the trial and determination of an attachment suit in favor of plaintiff, upon personal service upon defendant of the pendency of said cause, and in which no defense is made, a good defense as a plea in bar to suit subsequently instituted by the defendant in the attachment suit for damages for the wrongful suing out of attachment and malicious use of process?" The answer depends upon the grounds upon which it is claimed in this action the attachment was wrongfully sued out. As that does not appear in the certificate, we are not able to say from the matter certified whether the plea in bar was well pleaded or not.

AFFIRMED.

1. APPEAL: less than \$100: when certificate must be signed.

2. ATTACHMENT: judgment by default: action in bond for wrongful suing out.

HENNING V. THE WESTERN ASSURANCE COMPANY.

1. **Fire Insurance: BREACH OF CONDITION AS TO OWNERSHIP: POLICY VOID.** The policy in question provided: "If the interest of the assured in the property be any other than the entire, unconditional, sole ownership of the property, for the use and benefit of the assured, it must be so expressed in the written part of this policy; otherwise the policy shall be void." The policy was issued to G. The property belonged to H., but that fact was not stated in the policy. *Held* that it was void *ab initio*, and that neither G. nor H. could recover thereon.
2. ——— : **OWNERSHIP OF PROPERTY: VERDICT AGAINST EVIDENCE.** Where the court instructed the jury that plaintiff could recover only upon condition that he was the absolute owner of the property insured and destroyed, and it appeared by plaintiff's own affidavit, and by other testimony, that plaintiff held the property only as collateral security, though under a bill of sale, a verdict for plaintiff was contrary to the evidence and instructions, and should have been set aside.

Appeal from Creston Superior Court.—HON. GEORGE P. WILSON, Judge.

FILED, MAY 11, 1889.

ACTION upon a policy of insurance against loss by fire. Trial by jury. Verdict and judgment for plaintiff. Defendant appeals.

Hanna & Porter, for appellant.

John A. Patterson, for appellee.

ROTHROCK, J.—I. The property insured consisted of certain household goods and kitchen furniture, situated in a building in the city of Creston, and was destroyed by fire on the sixth day of February, 1888. The policy of insurance was issued by the defendant upon the application of one G. F. Doege. It insured him and his legal representatives against loss by fire of the property

1. **FIRE INSURANCE: breach of condition as to ownership: policy void.**

Henning v. Western Assurance Co.

in question. It is conceded that he was not the owner of the property at the time the insurance was effected, nor at any time afterwards, and that he had no insurable interest therein. The property was owned by one H. Doege, and it is not claimed that when G. F. Doege made application for the insurance he stated to the agent of the defendant, who issued the policy, that H. Doege was the owner of the property. It is provided in the policy that "if the interest of the assured in the property be any other than the entire, unconditional, sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void." No action could have been maintained on this policy by G. F. Doege, because he was not the owner of the property, and, the policy being void by its express terms, no recovery thereon could be had by H. Doege under the facts above stated. *Zimmerman v. Insurance Co.*, 76 Iowa, 352. The policy was void *ab initio*, because the risk never attached. *Waller v. Assurance Co.*, 64 Iowa, 101.

But it is claimed that the plaintiff is nevertheless entitled to recover because the policy was assigned to him before the property was destroyed by fire. The facts with reference to the assignment are as follows: H. Doege made a bill of sale of the property described in the policy, together with other property, to the plaintiff. G. F. Doege went to one Bryan, who was agent of the defendant, and represented that the property had been sold to the plaintiff, and thereupon the policy was assigned to the plaintiff. The endorsement on the policy and the assignment are as follows:

"This policy is not assignable for the purpose of collateral security, but in all such cases is to be made 'payable in case of loss,' etc., by endorsement on its face. In case of actual sale and transfer of title, leave having previously been obtained, the form subjoined may be used, which must be executed at the time of said transfer.

Henning v. Western Assurance Co.

“The Western Assurance Company hereby consents that the interest of Gus. Doege in the within policy be assigned to Charles Henning, subject, nevertheless, to all the conditions herein contained. December 29, 1887.

“J. F. BRYAN, Agent.”

“For value received I hereby transfer, assign and set over, unto Charles Henning and his assigns, all my right, title and interest in this policy of assurance, and all benefits and advantage to be derived therefrom. Witness my hand and seal this twenty-ninth day of December, 1887.

“Signed, sealed and delivered in the presence of —.

“G. F. DOEGE and H. DOEGE.”

It was stated by G. F. Doege, in his testimony on the trial, that at the time of the assignment he stated to Bryan that the property, when insured, was the property of H. Doege, and that thereupon H. Doege united with him in the assignment. This was denied by Bryan. It will be seen that this raises a conflict in the evidence, and the jury might fairly have found that the claim of plaintiff, so far as this fact is properly involved, was sustained. But the evidence shows that the plaintiff did not purchase the property described in the mortgage. His bill of sale was no more than a mortgage to secure a loan of five hundred dollars, made by the plaintiff to H. Doege. This was the sole consideration for the bill of sale. After the property was destroyed by fire, the plaintiff was paid six hundred and fifty dollars by the Hamburg Bremen Insurance Company in payment of the loss by fire of said company on a part of the property covered by the bill of sale. Plaintiff returned this money to G. F. Doege, who is the husband of Hulda Doege, and commenced suit in his name against the defendant. The facts last above stated are established by an affidavit of the plaintiff, and by the positive testimony of two other witnesses, to the effect that the plaintiff stated the facts in relation to his ownership substantially as above set forth. It would appear from

this evidence that the plaintiff had no interest whatever in the claim made in the petition, neither as owner nor as mortgagee. The mortgage had been paid in full. But it is claimed that there is a conflict in the evidence as to the ownership of the goods, because G. F. Doege testified that the transaction was a sale. We do not think the jury was authorized to find a fact against the sworn statement of the plaintiff. He ought not to have been permitted to demand a verdict so palpably against his own sworn statement.

The court instructed the jury upon this question as follows: "The policy sued on in this action contains the following provisions, viz.: 'If the interest in the property be any other than the entire, unconditional, sole ownership of the property,—for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void.' And you are instructed, as a matter of law, that the above condition in said policy is binding on plaintiff, and that, unless his ownership was that of entire, unconditional, sole ownership of the property for the use and benefit of himself (no other title or interest being shown in writing upon the face of the policy, or endorsed on said policy), then plaintiff cannot recover in this action for the loss. You are instructed, as a matter of law, that if the plaintiff to this action was not the absolute owner of the property insured at any time, and particularly at the time of the loss by fire, but only held an equitable interest therein as collateral security, then plaintiff cannot recover upon this policy for the loss, under the pleadings in this action." The court submitted special interrogatories to the jury. Two of these, with answers by the jury, are as follows: "Was he (the plaintiff) the absolute owner of the property? *Answer.* Yes. Did Charles Henning (the plaintiff) claim the property other than as collateral security for the payment of five hundred dollars? *A.* Yes." These answers are plainly and palpably against the evidence and instructions of

2. —: owner-
ship of prop-
erty: verdict
against evi-
dence.

West v. Ward.

the court, and we think that the verdict should for that reason have been set aside, and a new trial ordered. It is possible that if the plaintiff had been a witness upon the trial, and had claimed that the affidavit above referred to was not true, and that it was obtained by fraud, or made some other reasonable explanation of it, the verdict might be sustained. But without some such explanation we cannot account for the finding of the jury.

REVERSED.

WEST V. WARD.

Proximate Cause: INJURY TO MARE ESCAPING THROUGH OPENED FENCE. Plaintiff was pasturing his highly bred mare in an enclosure, and the surrounding country was largely fenced with barbed wire, which is especially dangerous to horses running at large. Defendant wrongfully opened and left open the fence of the enclosure, and the mare escaped through the opening and became entangled with a barbed wire fence and was injured. *Held* that defendant's wrong in opening the fence and leaving it open was what exposed the mare to the danger, and was the proximate cause of the injury; and a direction to the jury to find for the defendant on the ground that it was not the proximate cause was erroneous.

Appeal from Dallas District Court.—HON. J. H. HENDERSON, Judge.

FILED, MAY 11, 1889.

ACTION to recover damage resulting to a valuable, highly bred mare from injuries caused by a wire fence to which she was exposed by the wrong and negligence of defendant in opening the fence enclosing the pasture wherein the mare was running. After the evidence on behalf of plaintiff was submitted, the district court directed the jury to return a verdict for defendant, which was done, and judgment was rendered thereon, from which plaintiff appeals.

77	323
88	237
77	323
101	588
77	323
127	492
77	323
133	703

Edmond Nichols and R. S. Barr, for appellant.

White & Clarke, for appellee.

BECK, J.—I. The petition alleges substantially that plaintiff was the lessee of certain pasture land wherein he kept certain valuable horses, among others a highly bred and well-trained young trotting mare of great value; that defendant unlawfully went upon the premises, wrongfully and negligently opened the fence enclosing it, and left it open, which permitted the young mare to escape from the pasture; that the country surrounding the pasture was largely fenced with barbed wire, which is dangerous to stock running at large; and that the mare, in attempting to return to the locality from which she had been brought, became entangled in a barbed-wire fence, and was severely cut and wounded, so that her value was almost destroyed. The evidence tends to support the allegations of the petition, showing that the country about the pasture was largely fenced with barbed wire, which is dangerous to stock, especially those running at large. The defendant moved the court for a verdict in his behalf on the following grounds: “*First.* The evidence introduced by the plaintiff fails to show that the wrong of the defendant of which the plaintiff claims is the proximate cause of the injury for which he sues. *Second.* The evidence of the plaintiff shows affirmatively that the wrong of the defendant of which the plaintiff pleads is not the proximate cause of the injury for which plaintiff sues, but that it is the result of an independent cause. *Third.* No evidence has been introduced tending to show that the injury of which the plaintiff claims is the usual and ordinary, natural and probable and approximate result of the alleged wrongful conduct of the defendant.” This motion was sustained, and a verdict accordingly returned, upon which a judgment was rendered for defendant.

II. We need not determine whether the question of the sufficiency of the evidence to show that the act of defendant in opening the fence was the proximate

cause of the injury, and the usual, ordinary, natural and probable result of the defendant's act, was exclusively for the court or for the jury. Upon this question, see *Dubuque Wood, etc., Ass'n v. City and County of Dubuque*, 30 Iowa, 176; *Knapp v. Railway Co.*, 71 Iowa, 41; *Handelun v. Railway Co.*, 72 Iowa, 709; *Bosch v. Railway Co.*, 44 Iowa, 402; *Scheffer v. Railway Co.*, 105 U. S. 249. If the record before us shows that defendant's act was the proximate cause of the injury, and should have been so found, the direction of the court requiring a verdict for defendant is erroneous. We are therefore to inquire whether the evidence shows that the injury to the mare was the usual, ordinary, natural and probable result of defendant's act in opening the fence of the pasture.

III. The plaintiff's mare was kept in the enclosure of the pasture, not only that she might graze, but also that she might be protected from the dangers to such property resulting from her running at large. These dangers are many and obvious. Among them is the danger from barbed-wire fences, which, the evidence tends to show, especially exists as to horses of her kind running at large. If she had been kept in the enclosure of the pasture these dangers as to her would not have existed. When, through the defendant's act, she was permitted to run at large, the dangers commenced, and ended in the injury. The animal was exposed to the danger of barbed-wire fences as soon as she commenced running at large. It is plain that defendant's act exposed the mare to the danger, and it is equally plain that the injury resulted from the act. It is also plain that this injury was the proximate result of defendant's acts, for it immediately followed that act as a sequence. It was the usual, ordinary, natural and probable result, for the evidence tends to show that it was dangerous to permit horses of this kind to run at large. The word "dangerous" means "attended with danger, perilous, full of risk," etc. Where there is danger, peril, risk of a particular injury, which actually occurs, we must surely say that it is the usual, ordinary,

natural and probable result of the act exposing the person or thing injured to the danger and peril. In the case before us the mare was not exposed to danger of injury before she was permitted to run at large. Defendant's acts exposed her to danger of the injury. The injury followed without any intervening act adding to the danger or aiding to bring the animal within the exposure thereto. Surely defendant's act in breaking the fence, and thus permitting the mare to run at large, was the direct and proximate cause of the injury. We reach the conclusion that the district court erred in directing the jury to return a verdict for defendant. The judgment is therefore **REVERSED.**

THE FIRST PRESBYTERIAN CHURCH OF LOGAN V.
LOGAN *et al.*

Deed: REFORMATION: EVIDENCE REQUIRED. Courts will never give relief by the reformation of a deed, or annul or set aside deeds, on the ground that they do not conform to the contract of the parties, unless the evidence is clear and satisfactory, and establishes plaintiff's right beyond reasonable doubt. (See cases cited in opinion.) And in this case, where plaintiff claims that it bargained for and purchased more ground than the deed described, and seeks to have the deed reformed, or set aside and a new one decreed, *held* that the evidence (for which see opinion) did not warrant the relief sought.

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

FILED, MAY 11, 1889.

ACTION to quiet the title of certain town lots in plaintiff. After a trial upon the merits, plaintiff's petition was dismissed. It now appeals to this court.

J. W. Barnhart, for appellant.

Charles MacKenzie, for appellees.

77	323
90	44
77	326
92	392
77	326
102	354

BECK, J.—I. The defendant Logan, in 1877, soon after the organization of plaintiff, conveyed to it certain lots in the town of Logan, to be used for the erection thereon of plaintiff's house of worship. The block in which the lots were located had been, about a year before the sale, divided anew, so that the new lots were of sizes, descriptions and designations different from the lots as they were under the original subdivision. The property was enclosed with a fence, which we understand was erected before the new subdivision, and conformed to the old. The conveyance to plaintiff described the property according to the new subdivision, which divided the ground in controversy into five or six lots, instead of two and a fraction of another, according to the original plat. The ground conveyed did not equal in quantity the area of the two lots and fraction.

II. Plaintiff claims that it bargained for, and bought of defendant Logan, these two lots and the fraction, but he conveyed to it lots described according to the new subdivision, which did not cover as much ground as it bought and paid for. Logan conveyed the part of the land claimed by plaintiff, which is not covered by the deed to it, to other parties, who claim to be good-faith purchasers, without notice of plaintiff's claim. Logan denies the bargain and contract as claimed by plaintiff, and avers that they were made to accord with the description of the lots as set out in the new subdivision, and that the deed conveys the land actually contemplated in the bargain and contract of plaintiff. The issue thus presented involves a question of fact, which, in our opinion, is decisive of the case, namely, did Logan bargain and sell to plaintiff the land claimed by it?

III. The evidence upon this question is conflicting. One of the trustees of the plaintiff, who made for it the contract of purchase, testifies with positiveness that there was a written contract prior to the deed, describing the lots according to the old plat. Other trustees do not know that there was a written contract. They

First Presbyterian Ch. of Logan v. Logan.

never saw it, and have no knowledge on the subject. They think there was an agreement to purchase the lot which was enclosed. It may be conceded that all the trustees and one or two others give evidence tending more or less strongly to support plaintiff's claim. Logan testifies positively that there was no such contract as claimed by plaintiff and its trustees; that he bargained and sold the lots according to the new subdivision, which was understood by those attending to the business for the plaintiff. He is corroborated to some extent by circumstances, but the strong corroboration is the fact that the deed was made in conformity to the new subdivision, and described the lots just as Logan testifies they were bargained to plaintiff. This deed was delivered to, and accepted by, plaintiff without objection, and no claim contrary to its terms was made for about ten years, when the part of the land in dispute was occupied by persons claiming under Logan.

The plaintiff seeks in this case to set aside the deed, and asks the court to require Logan to reconvey the property according to the old plat, or that the deed be so reformed that it will convey the property claimed by plaintiff; but the courts will never give relief by the reformation of a deed, or annul and set aside deeds on the ground that they do not conform to the contract of the parties, unless the evidence be clear and satisfactory, and establish plaintiff's right beyond reasonable doubt. *Gelpcke v. Blake*, 15 Iowa, 387; *Jack v. Naber*, 15 Iowa, 450; *Tufts v. Larned*, 27 Iowa, 330; *Wachendorf v. Lancaster*, 61 Iowa, 509; *Hervey v. Sanery*, 48 Iowa, 313; *Clute v. Frasier*, 58 Iowa, 268. Under this familiar rule we cannot interfere with the decree of the district court. We cannot reach a conclusion satisfactory to us, and which we can entertain free from the gravest doubts, that plaintiff did bargain for and buy any other lots than those described in the deed. The decree of the district court must therefore be

AFFIRMED.

BUCKLAND V. SHEPHARD & CO.

Appeal: JURISDICTION: AMOUNT IN CONTROVERSY: CASES CONSOLIDATED. Plaintiff brought two successive actions in justice's court against defendants, and from the judgment rendered in the first case the plaintiff appealed to the district court, and from the judgment rendered in the second case the defendants appealed. In the district court the causes were consolidated, by consent, and new pleadings were filed, the plaintiff in his substituted petition claiming \$4.62 for turkeys, and \$63.99 for corn. Defendants admitted the claim for corn, but denied liability for turkeys, and pleaded a counter-claim, which plaintiff denied. There was a verdict and judgment for plaintiff for \$47.93, from which defendant appeals to this court, but there is no certificate of the trial judge. *Held—*

- (1) That as to the question of jurisdiction in this court, the consolidated case should be regarded the same as if it had originated in the district court.
- (2) That, as there could not have been a judgment under the pleadings for either party for one hundred dollars in the trial court, the amount in controversy was less than that amount, and that this court has no jurisdiction in the absence of a certificate. (Compare cases cited in opinion.)

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MAY 11, 1889.

THE plaintiff commenced suit in justice's court to recover seventy-five dollars, balance due for corn. The defendants admitted \$63.99 due to plaintiff, and pleaded a counter-claim for \$111.15. The plaintiff not appearing, the justice entered judgment dismissing his cause of action, and rendering judgment in favor of defendants for \$24.44, from which the plaintiff appeals to the district court. Afterwards the plaintiff commenced suit before a justice of the peace, claiming eighty-five dollars as the balance due him for corn, and for turkeys sold to defendants, to which the defendants answered, setting up the judgment in the first suit. Plaintiff demurred,

Buckland v. Shephard & Co.

the demurrer was sustained, and, defendants refusing to further plead, judgment was rendered in favor of the plaintiff for \$68.17 and costs, from which the defendants appealed to the district court. In the district court plaintiff's motion to dismiss the appeal in the last case was overruled, and defendants' motion to consolidate the two cases was sustained by consent, and by consent the plaintiff was given thirty days to file an amended and substituted petition, including both cases; the defendant thirty days thereafter to file substituted answer and counter-claim; and the plaintiff until August 25, 1888, to reply. The plaintiff filed a substituted petition asking to recover \$4.62 for turkeys, and \$63.99, balance due on corn, making \$68.61. The defendants admitted the balance due on corn; denied every allegation not admitted, thereby denying the claim for turkeys; and pleaded a counter-claim for \$102.06, which the plaintiff denied. Upon these issues the case was submitted to a jury. Verdict for plaintiff, \$47.93. Defendants appeal. On the trial the defendants conceded that plaintiff was entitled to be allowed the amount claimed in his petition, subject to their right to recover on their counter-claim.

John N. Weaver, for appellants.

Murphy & Fort, for appellee.

GIVEN, C. J.—Appellee contends that this court has no jurisdiction to entertain this appeal, for the reason that the amount in controversy, as shown by the pleadings, does not amount to one hundred dollars, and there being no certificate of the trial judge. The consolidation of the two cases from the justice's court and the filing of pleadings in the district court having been by consent, we consider the case the same as if originally brought in the district court. Code, section 3173, relating to appeals to this court, provides: "But no appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless

Buckland v. Shephard & Co.

the trial judge shall certify that such cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court." There being no certificate in this case, the question turns upon whether the amount in controversy, as shown by the pleadings, exceeds one hundred dollars. The amount in controversy is to be determined upon the pleadings alone. *Ormsby v. Nolan*, 69 Iowa, 133. By the pleadings, the plaintiff's claim is admitted, except as to the \$4.62; the defendant's counter-claim of \$102.06 is denied. In *Alsip v. Hard*, 38 Iowa, 697, the plaintiff claimed \$324.40. The defendant admitted the claim, and pleaded a counter-claim of one hundred dollars. The court says: "There being no controversy upon the claim of the plaintiffs, we must regard the counter-claim of the defendants as the amount in controversy in the action, and, since defendants' amount does not exceed one hundred dollars, no appeal lies to this court." In *Madison v. Spitsnogle*, 58 Iowa, 369, the plaintiff claimed sixty dollars, and the defendant, a counter-claim of fifty dollars, each denying the claim of the other. In deciding the question of amount in controversy, the court says: "By combining the claims of both parties, there was one hundred and ten dollars in controversy; but both parties do not invoke the jurisdiction of this court, and we think the true construction of the statute is that it must appear from the pleadings that it was possible for the justice, consistently with the pleadings, to render judgment against one of the parties to the action for more than one hundred dollars. It is certain this could not have been done." This case was followed in *City of Centerville v. Drake*, 58 Iowa, 564, wherein the plaintiff sought to recover \$91.57, to which the defendant pleaded a counter-claim of one hundred dollars. There is no conflict between these cases. In the one it was simply held that the amount claimed in the counter-claim being the only sum in controversy, and that not exceeding one hundred dollars, there was no appeal. In the other it was held that, unless, consistent with the pleadings, judgment exceeding one hundred dollars can be entered,

Williams v. Wescott.

there can be no appeal. In this case the counter-claim is for more than one hundred dollars, and is in controversy ; yet with the admission of the plaintiff's claim it is not possible, under the pleadings, to render judgment against either party for more than one hundred dollars, and hence the case is within the rule laid down in *Madison v. Spitsnogle*, and it is not appealable to this court without certificate,—the amount in controversy, as shown by the pleadings, not exceeding one hundred dollars. The appeal is **DISMISSED.**

77	332
119	185
119	186

77	332
137	376

WILLIAMS *et al.* v. WESCOTT *et al.*

77	332
140	397
142	361

1. **Judgment: DEFAULT: MOTION TO SET ASIDE: NEGLECT OF COUNSEL: EXCUSE.** Plaintiffs filed their petition herein February 25, 1888. On the first day of the term, to-wit, March 19, the defendants appeared and filed a motion to strike portions of the petition. This motion was sustained March 23, and on the next day defendants answered, asking that the petition be dismissed, and that defendants' title be quieted, and for general relief; and one of the defendants set up a counter-claim. March 26, defendants filed a motion for default against certain of the plaintiffs, and on the same day the defendant who filed the counter-claim moved for default therein against the other plaintiff. At that time the plaintiffs had not appeared to the motions and answers, and, so far as the record shows, had done nothing in the cause after filing the petition. The motions for default were not resisted, and they were sustained the day they were filed, and final decree rendered accordingly. April 12, following, plaintiffs filed motions to set aside all these orders and the decree, and these motions were overruled. Plaintiffs resided several hundred miles from the seat of the court in which they had begun their cause. Nearly three weeks before the term commenced they wrote the clerk asking to be advised of papers filed and for copies to be sent, "if not too much trouble." This letter was not answered, and they took no further steps to advise themselves of the condition of the case, nor of the business of the court, until after the decree was rendered. *Held* that plaintiffs' neglect, through their attorneys, was not excusable, and that the motions to set aside the orders and decree were properly overruled. (See opinion for statutes and authorities bearing on the question.)

Williams v. Wescott.

2. ———: ———: ———: **SHOWING OF MERITS.** Where the affidavits filed by plaintiffs in support of a motion to set aside a judgment against them, entered by default, do not add materially to the showing of merits made by the petition, and show no defense to a counter-claim, except by a general averment of a perfect defense thereto, made by one of the plaintiffs' attorneys, the showing is insufficient to entitle the plaintiffs to a favorable ruling on the motion.
3. **Partition: DEFECT OF PARTIES: VALIDITY AS TO THOSE IN COURT.** Although in a partition case the court does not acquire jurisdiction of all the persons interested in the real estate, the proceedings are not void or voidable as to those who are actually or constructively in court.
4. ———: **SERVICE BY PUBLICATION: NON-RESIDENT MINORS.** Service by publication in partition cases is expressly authorized by section 2618 of the Code, and where non-resident minors are so served and a guardian *ad litem* is appointed and answers for them, the judgment is final and conclusive as to them.
5. ———: **ACQUIESCENCE OF PARTIES AND ACCEPTANCE OF SHARES: ESTOPPEL.** Where parties to a partition suit acquiesce in the proceedings and receive and retain their shares of the proceeds, they are estopped to question the validity of the proceedings; and so is one who takes from them a subsequent conveyance of their interest in the land, with knowledge of the facts.
6. **Dower: EXTINGUISHED BY PARTITION SALE AGAINST HUSBAND.** A sale of land in partition proceedings is a "judicial sale" within the meaning of section 2440 of the Code, and such a sale of the husband's interest in land in a proceeding to which he is a party, extinguishes the wife's right of dower, even though she is not made a party thereto.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, JUDGE.

FILED, MAY 11, 1889.

THIS is an action in equity, commenced to set aside the decree rendered and certain orders made in proceedings for the partition of real estate. The defendants appeared and filed a motion to strike from the petition, which was sustained. They then filed an answer, and the defendant Hedges filed a counter-claim. The plaintiffs were adjudged in default, and judgment was rendered against them. Judgment was also rendered in

Williams v. Wescott.

favor of defendant Hedges on his counter-claim. Plaintiffs filed motions to set aside the judgment and default, which were overruled. They appeal from the rulings and judgment of which they complain.

Parsons & Perry, for appellants.

Craig L. Wright, for appellees.

ROBINSON, J.—The petition states that on the fifteenth day of July, 1882, Jesse L. Williams, a resident of the state of Indiana, was the owner of an undivided one-half of the east half of the northeast quarter of section 20, township 89, range 47, in Woodbury county; that defendant George E. Wescott was then the owner of an undivided one-fourth of said tract, and that an undivided one-fourth thereof was owned by forty-three persons as tenants in common, and as heirs of Israel G. Lash, deceased, all of whom were non-residents of the state of Iowa; that of said heirs sixteen were minors; that on said date defendant Wescott commenced an action in the circuit court of Woodbury county for the partition of said real estate, making all of said persons, excepting Lucie D. Douthit, parties defendant, and also making one John P. Allison, as guardian of said minors, a defendant; that said Allison acknowledged service of the original notice, but that as to all the other defendants it was served by publication only; that Allison was not in fact the guardian of said minors, nor was he authorized to represent them; that said court found that due service of the original notice had been made; that it appointed a guardian *ad litem* for twelve of the minors, who filed answer as such guardian; that it found said Wescott was the owner of an undivided one-fourth of said premises, the said Jesse L. Williams the owner of an undivided one-half, and the remaining defendants, or heirs of Lash, the owners of an undivided one-fourth thereof, and appointed referees to make partition of the same.

The petition further alleges that the premises in question were sold by the referees; that the sale was

Williams v. Wescott.

confirmed as made to defendant John Pierce, but that it was in fact made without due authority, and without sufficient notice; that the order confirming the sale was made without notice to the non-resident defendants, who had no knowledge thereof until more than three years thereafter; that the individual interests of the heirs of Lash were not determined; that none of the non-resident defendants appeared in said action, and none of the minors had any knowledge of the action until more than two years after the decree had been rendered therein. The petition further states that said Jesse L. Williams died testate in the year 1886; that he devised all of his interest in said premises to plaintiffs Edward P., Meade C. and Henry M. Williams; that plaintiff Susan C. Williams was long prior to July 26, 1883, the lawful wife of said Jesse, and so continued to be until the time of his death, and is entitled to one-third of his interest in said premises; that plaintiff Henry M. Williams has purchased of said Edward J. Douthit, Jr., and of said Lucie D. Douthit, all their interest in said premises, and now owns the same; that defendants John Pierce and Daniel T. Hedges claim to be the owners of said premises under the partition proceedings, and that such proceedings are a cloud upon the title of plaintiffs. They demand that the decree and all orders in such proceedings be vacated; that the plaintiffs be declared the owners of the interests in said premises claimed in the petition; and that they have such other and further relief as may be equitable and proper.

The petition was filed on the twenty-fifth day of February, 1888. On the first day of the term, to-wit, on the nineteenth day of March, 1888, the defendants appeared and filed a motion to strike from the petition the fifth, sixth, seventh, eighth and a part of the tenth paragraphs, and to strike from the title the names of all the plaintiffs but Henry M. Williams. The portions of the petition which the motion sought to have stricken out were allegations to the effect that Jesse L. Williams was a resident of Indiana when the action for partition

Williams v. Wescott.

was commenced ; that he was served with notice thereof only by publication ; that he died testate ; that plaintiffs acquired title from him as stated ; averments in regard to the procuring of the order of partition ; the appointment of referees ; the report of the referees ; their alleged want of authority to sell ; and averments of action of the court without jurisdiction. The motion was sustained on the twenty-third day of March, 1888. On the next day the defendants filed their answer, in which they denied the allegations of the petition not otherwise answered ; admitted the ownership of Jesse L. Williams, Wescott and the heirs of Lash, on the fifteenth day of July, 1882, of the premises in controversy ; that an action for the partition thereof was commenced by Wescott, as alleged ; that all the defendants therein were at that time non-residents of Iowa ; that a decree confirming the sale under the partition proceedings was rendered on the second day of January, 1883 ; admitted that defendant Hedges claims to own the premises under the partition proceedings, and denied knowledge or information sufficient to form a belief as to the alleged minority of any of the heirs of Lash ; denied that Lucie D. Douthit was an heir of Lash ; and denied knowledge or information as to whether Edward Douthit, Jr., had any interest in the real estate. Defendant Hedges also filed a counter-claim, in which he alleged himself to be the owner of the land in controversy, and set out the partition proceedings alleged in the petition. He alleged the sale of the premises to Pierce as the highest and best bidder for the sum of two thousand dollars ; that the sale was confirmed, and a conveyance duly made to Pierce, who subsequently conveyed the premises to Hedges ; that due notice of all the proceedings was given to all parties in interest ; and that Edward J. Douthit, Jr., and Lucie D. Douthit have recognized the validity of said proceedings, and acquiesced in the same, and receipted for and released all their claim to the proceeds of said sale long before the pretended conveyance to plaintiff by them, of all of which plaintiff had full knowledge. The answer asks that the petition of plaintiff be dismissed ;

Williams v. Wescott.

that defendants' title be quieted as against him; and for general equitable relief. On the twenty-sixth day of March, 1888, the defendants filed a motion for default against plaintiffs Susan C., Meade C. and Edward P. Williams, and on the same day defendant Hedges moved for default on his counter-claim against Henry M. Williams. At that time plaintiffs had not appeared to the motions nor answers, and, so far as the record showed, had done nothing in the cause after filing the petition. The motions were not resisted, and on the day they were filed were sustained, and a decree was rendered in favor of defendants dismissing the petition of plaintiffs and quieting the title of defendants in the land in question. On the twelfth day of April, 1888, the plaintiffs filed motions to set aside the various orders aforesaid and the final decree. After a hearing on these motions they were overruled, and that ruling is presented to us for review.

I. The first question to be determined is whether the plaintiffs sufficiently excused their failure to appear

1. JUDGMENT: in court and make timely resistance to the
 default: orders and decree of which they now com-
 motion to set aside: neglect plain. The showing in excuse of the default
 of counsel: is substantially as follows: The plaintiffs
 excuse.

were represented by Messrs. Parsons and Perry, attorneys, of Des Moines. Mr. Parsons left home on the seventh day of March, 1888, and was continuously absent from the state until the fifth day of April. Before leaving, he requested Mr. Perry to write to the clerk of the court, requesting him to send to them copies of all papers filed in the case immediately upon their being filed, and to give immediate attention to all steps which should be taken by defendants or their attorneys during his absence. On the twenty-eighth day of February, 1888, Mr. Perry wrote to the clerk of the court at Sioux City as follows: "Will Mr. James Fullerton of your city be accepted as surety on cost-bond? If so, we will send one up to him, and have him bring the same to you for approval. Will you kindly

advise us of any papers filed in the case by defendants, and, if not too much trouble, send us copies of the same?" That letter was not answered, although it was received in due time. March 31, 1888, Parsons & Perry sent to the clerk the following telegram. "Send us immediately copy of all papers and decrees in Williams vs. Wescott, except petition." At four o'clock in the afternoon of April fifth, Parsons and Perry first heard from the clerk by means of a letter in language as follows: "Excuse my delay in not replying sooner. My deputy is sick, and, having only one, a good deal of work has fallen upon my shoulders. I enclose herewith motion, copy of answer and counter-claim, decree prepared by Mr. C. L. Wright, which I have just entered of record; also above entry, being ruling of court on motions to strike." The two letters and the telegram were the only communications which passed between the attorneys for the plaintiffs and the clerk relative to the pleadings and proceedings in the cause. The only rules of practice in force in Woodbury county at that time were those adopted by the convention of judges on the eighth day of January, 1887. One of these required that "every party, at the time of filing any petition, answer, reply, demurrer or motion, except a motion for continuance or change of venue, shall file with the same one plain copy thereof for the use of the adverse party." It may be conceded that the attorneys for the plaintiff had intended in good faith to do whatever was necessary to protect and promote the interests of their client in this case, and that their failure to make timely appearance to the various papers filed was due to their not having heard from the clerk. But it does not appear that the court, nor the attorney for defendants, had any knowledge of their correspondence with the clerk, nor of their intentions in regard to the case. Section 2635 of the Code provides that "the defendant shall, in an action commenced in a court of record, demur, answer or do both, as to the original petition, before noon of the second day of the term." Section 2636 provides that "each party shall demur, answer or

reply to all subsequent pleading, including amendments thereto and substitutes therefor, before noon of the day succeeding that on which the pleading is filed. But all pleadings must be filed by the time the cause is reached for trial." Section 2639 requires all motions assailing a pleading, except in certain cases, to be filed before an answer or reply has been filed. It appears, therefore, that plaintiffs were in fact given more time to appear and plead in this case than they could have claimed under the statute. Appellants insist that they had a right to rely upon the clerk for information as to the pleadings filed and proceedings had, but they have not called our attention to any statute or rule which imposes that burden upon him, and in this case the clerk did not assume it. Certainly it was not placed upon him by the rule quoted. A due regard for the dispatch of business requires of litigants a prompt attention to the preparation and prosecution of their causes. In this case the attorneys for plaintiff resided several hundred miles from the place where the court in which the cause was pending was being held. Prior to the rendition of the final decree they wrote one letter to the clerk, asking to be advised of papers filed, and to have copies sent, "if not too much trouble." This was written nearly three weeks before the term commenced, and was never answered. They knew that fact, but do not seem to have taken any other steps to inform themselves of the condition of the case, nor of the business of the court, until after the decree was rendered. They do not seem to have been misled by any mistake of fact, as in the case of *County of Buena Vista v. Railway Co.*, 49 Iowa, 657. The absence of counsel was not unavoidable. "The party and his attorney must take notice of the time and place of holding court, and of the position of the cause on the calendar, and be present when it is called for trial." 1 Hayne, *New Trials & App.*, p. 226, sec. 76 (2). It has been said that the fact that a party was misled as to the condition of the calendar, and hence did not have a material witness in attendance when the cause was reached for trial, furnishes no

ground for a new trial. Hill. New Trials, p. 534, sec. 24. Applications of the kind under consideration must necessarily be governed in large part by the facts of the case, and should be determined in the exercise of a sound legal discretion.

II. The next matter for our consideration is the showing of merits on the part of plaintiffs. The

affidavit of Mr. Parsons contains the only
2. —: —: showing of merits. allegations of merit excepting the averments of the petition, and they are as follows:

“Deponent further says that he believes he is fully acquainted with all the facts affecting plaintiffs’ right to recover set out in the petition; that they are in every essential respect, except as to the allegations in the so-called counter-claim of the said Hedges as to who were made parties in said action for partition of said premises, and the allegation therein that said Edward J. Douthit, Jr., and Lucie D. Douthit recognized the validity of said partition proceedings, and the allegations that the court ordered a sale of said premises, and excepting the legal conclusions contained in said pleading, the same as set out in the said defense or counter-claim of said Hedges; and that plaintiffs have a good and substantial defense to said claim of said Hedges; and that the same would fully appear upon the trial of this action on plaintiffs’ petition and the denials contained in defendants’ answer. * * * Deponent further says he believes that plaintiffs have a perfect defense to the claims of said Hedges, and that great injustice would be done them unless said decree be vacated and plaintiffs be allowed an opportunity to try this case upon its merits.” Mr. Perry states under oath that the value of the real estate in controversy, according to the best information he can obtain, exceeds the sum of twenty thousand dollars. Its value when the referee’s sale was approved—something more than five years before—is not shown. The affidavits filed in support of the motions of plaintiffs do not add materially to the showing of merits made by the pleadings. From them we learn that three of the plaintiffs claim as

Williams v. Wescott.

devisees, and one as widow of Jesse L. Williams, deceased; that the aggregate interest thus claimed by them is the ownership of an undivided one-half of the premises in controversy. In addition to the interest he claims to have derived as devisee, Henry M. Williams claims to be the owner of an undivided one-four-hundred and fortieth of said premises as the grantee of Edward J. Douthit, Jr., and Lucie D. Douthit. The petition shows that Edward Douthit and Edward T. Douthit were heirs of Lash, deceased, but fails to show that Edward J. Douthit, Jr., was such heir. Conceding, for the purposes of this case, that he was a minor heir of said Lash when the partition proceedings were pending, we find Henry M. Williams' alleged interest to be as stated.

It seems to be the theory of plaintiff that if the circuit court did not acquire jurisdiction of all the

persons interested in the real estate, the proceedings in partition were voidable, if not void; but that cannot be true of those who were actually or constructively in court,

and who made no objection to the proceedings. If the persons who were not made parties are satisfied, those who were should not be heard to complain. The petition shows that service by publication was made upon

all the non-resident parties defendant in the partition proceeding. Such service was expressly authorized by statute. Code, sec. 2618. (2) It was sufficient as to non-

resident minors. *Judd v. Mosely*, 30 Iowa, 426. A guardian *ad litem* was appointed, and filed answer for Edward Douthit. Therefore, as to his interests, the proceedings in partition had become final and conclusive in favor of defendants before this action was commenced.

The counter-claim alleges that both Lucie D. Douthit and Edward J. Douthit, Jr., acquiesced in the partition

proceedings, and receipted for and retained all their claim to the proceeds of the sale long before their alleged conveyance to Henry M. Williams was made, and that he

3. PARTITION :
defect of parties : validity
as to those in court.

4. — : service
by publication : non-
resident minors.

5. — : acquiescence of parties and acceptance of shares :
estoppel.

knew that fact. The counter-claim was not denied, excepting by a general averment of a perfect defense thereto, made by an attorney in support of the motions under consideration. We do not think it has been sufficiently met, but, if it has, we have seen that the interest of Edward J. Douthit, Jr., was extinguished before this action was commenced; and the interest acquired from Lucie D. Douthit would be little more than nominal, if plaintiffs' estimate of the value of the premises in question be accepted, to-wit, an undivided one-eight-hundred and eightieth of property valued at about twenty thousand dollars.

The petition shows that due service by publication was made on Jesse L. Williams, and that he lived more than two years after the referee's sale was made and the deed was executed. His interest in the premises was therefore terminated before his death, and his devisees acquired no title from him. But it is said that his wife was not made a party to the proceedings in partition, and therefore that she is entitled to recover an undivided one-third of the interest he held at the time the decree in partition was rendered. Section 2440 of the Code provides

6. DOWER: extinguished by partition sale against husband.

as follows: "One-third in value of all the legal or equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee simple if she survive him." Her interest is therefore contingent, and is subject to divestment, even by a judicial sale to which she is not a party. A referee's sale in partition proceedings is of that character. *Weaver v. Gregg*, 6 Ohio St. 547. See, also *Freem. Co-Tenancy*, sec. 474.

We conclude on the showing of the plaintiffs, conceding to it all which may be reasonably claimed, that it shows no right of recovery excepting in favor of Henry M. Williams for the interest alleged to have been acquired from Lucie D. Douthit which at most is less

Day v. The Hawkeye Ins. Co.

than twenty-five dollars in value. But the claim of defendants in regard to that interest has not been properly met. In our opinion the showing of diligence and merit made by plaintiffs is not sufficient to entitle them to the relief they demand.

III. Counsel discuss with much earnestness the ruling of the district court on the motion to strike from the petition, and the nature and effect of the counter-claim of Hedges. But, in view of the conclusion we have reached on other questions, no practical benefit would result from a further consideration of questions not determined. The rulings and decree of the district court are

AFFIRMED.

DAY *et al.* v. THE HAWKEYE INSURANCE COMPANY.

Appeal: NO NOTICE TO INTERESTED CO-PARTY: DISMISSAL. In an action by the insured upon a policy of fire insurance, a mortgagee to whom the loss, if any, was payable as her interest might appear, failing to join as plaintiff, was brought in as a defendant, under Code, sections 2548, 2551. From a judgment against the defendant company it appeals to this court, but fails to serve notice of the appeal on its co-defendant, the mortgagee, as required by section 8174 of the Code, and she does not join in the appeal. *Held* that the appeal must be dismissed. (See *Hunt v. Hawley*, 70 Iowa, 188; *Moore v. Held*, 73 Iowa, 538.)

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, May 13, 1889.

ACTION upon a policy of insurance. There was a judgment on a verdict for plaintiff. Defendant appeals. The facts of the case appear in the opinion. The cause has before been in this court. See 72 Iowa, 597.

George R. Sanderson and Phillips & Day, for appellant.

J. F. Lacey and McFall & Jones, for appellees.

77	343
82	500
77	343
96	16
77	343
115	688
77	343
130	407
77	343
142	293

BECK, J.—I. The policy in suit contains a condition in this language: "Loss, if any, payable to Dr. J. Bevan, mortgagee, as his interest may appear at the time of loss, subject, however, to all conditions of this policy." By amendments to the pleadings it is shown that Mrs. J. Bevan, the wife of Dr. Bevan, was the real mortgagee, and her name should have appeared in the policy instead of the name of Dr. J. Bevan, which was written by mistake. It is also shown in the pleadings that the given name of Mrs. J. Bevan is Lizzie, and she is made a defendant in the action, having failed to join as a plaintiff. An amended abstract filed in the case by the plaintiff, which is not denied by defendant, and must therefore be taken as true, shows that Mrs. J. Bevan, or Lizzie Bevan, did not join in the appeal, and no notice of appeal was served upon her in the case, and that she is, therefore, not a party to the appeal.

II. The plaintiffs have filed a motion to dismiss the appeal, on the ground that Lizzie Bevan is not a party to the appeal, which was submitted with the case. There can be no doubt that Lizzie Bevan is a party to the suit. She is the real party in interest in the claim to recover upon the policy, or one of the real parties. If she does not join as plaintiff, she may be made a defendant. Code, secs. 2548, 2551. She was made a party defendant in the case, but does not join with her co-defendant in the appeal, nor is notice of appeal served on her by her co-defendant, the appellant, as required by Code, section 3174. Now, it is obvious that Lizzie Bevan is not a party to this appeal, as well as that she is a real party in interest in the case, inasmuch as she claims the proceeds of the policy to the extent of her mortgage. In this case it is obvious that the judgment cannot be modified or reversed, or any order made affecting the claim upon the policy, without prejudice to Lizzie Bevan. Indeed, the pendency of the appeal has that effect. There are no questions in this case affecting the right of plaintiff to recover that do not affect Lizzie

Harris v. Chickasaw County.

Bevan's right. There are no questions which are between plaintiff and defendant that do not affect her. In the absence of notice of appeal required by the statute to be given to Lizzie Bevan, we cannot entertain the appeal. See Code, sec. 3174; *Hunt v. Hawley*, 70 Iowa, 183, *Moore v. Held*, 73 Iowa, 538. The motion to dismiss the appeal is sustained. DISMISSED

HARRIS V. CHICKASAW COUNTY.

77	345
85	677
77	345
98	681

Counties: LIABILITY FOR SALARY OF DEPUTY TREASURER. Section 771 of the Code, and section 5, chapter 184, Laws of 1880, are not in conflict. The former relates to the employment by a county officer of temporary assistance when the exigency of his duties requires it, without the authority of the supervisors; the latter to the employment of a regular deputy with such authority. In the former case, where the necessity for the temporary assistance is shown, and the board of supervisors refuses, on application, to furnish it, and the officer himself employs an assistant and pays him a reasonable compensation, he may recover the same from the county. (See cases cited in opinion.)

Appeal from Chickasaw District Court. — HON. CHARLES T. GRANGER, Judge.

FILED, MAY 13, 1889.

ACTION by a county treasurer to recover an amount paid by him as compensation to a clerk for labor and services rendered in assisting him in the discharge of his duties. Trial without a jury, and judgment for plaintiff. Defendant appeals.

George E. Stowe and H. Shaver, for appellant.

Springer & Clary, for appellee.

BECK, J.—I. The facts of the case are these: The plaintiff, being unable to perform alone all the duties of his office, employed a clerk to assist him, paying him

Harris v. Chickasaw County.

a reasonable salary for his services. He made application to the supervisors, requesting them to provide for him a clerk or deputy, which was refused. Prior to the commencement of this action, plaintiff presented his claim for payments to his clerk to the board of supervisors for allowance, which was refused. The necessity for the employment of the clerk is rightly found by the court below.

II. Counsel for defendant insist that under chapter 184, Acts, of Eighteenth General Assembly, section 5, the employment of a deputy or clerk for the county treasurer is to be exclusively determined by the board of supervisors, in the exercise of their judgment as to the necessity of such employment for the proper discharge of the duties of the office. It will be observed that the clerk or deputy provided by this section may properly be said to be a permanent officer, at least employed by the year at an annual salary. Doubtless the legislature intended that the supervisors should determine whether such an officer, to be employed permanently, should be appointed.

III. Code, section 771, is in this language: "When a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy, the board of supervisors may make a reasonable allowance to such deputy." This section provides that when the exigencies of the business of the office require the employment of a deputy, the supervisors are required to make a reasonable allowance for the services of such deputy. It has been held that payment for services of a deputy so employed is not discretionary with the supervisors, but upon their refusal to allow a claim therefor it may be recovered in an action against the county. *Washington County v. Jones*, 45 Iowa, 260; *Bradley v. Jefferson County*, 4 G. Greene, 300. It is shown that Code, section 771, and section 5, chapter 184, Acts, of Eighteenth General Assembly, are not in conflict, and may be so construed that both will stand. The first relates to employment of special or temporary

Luce & Co. v. Curtis.

assistance in the office without authority of the supervisors, and the second only upon such authority.

Questions raised by plaintiff as to the effect of a ruling upon a demurrer need not be considered, in view of our conclusions on the point of the case just announced. The judgment of the district court is

AFFIRMED.

LUCE & Co. v. CURTIS *et al.*

77 347
104 350

Mechanic's Lien: FORECLOSURE: PRIOR LIEN: SALE: REDEMPTION: POSSESSION. Where materials are furnished for an independent building on mortgaged premises, the material man has the prior lien on the building, and the mortgagee on the land; and upon the foreclosure of the mechanic's lien the court may, as between the material man and the owner, direct the sale of the building as personal property, *i. e.*, without redemption, giving the mortgagee a reasonable time in which to redeem the building before its removal, and in the meantime awarding the possession of the building to the purchaser, when such possession will not materially interfere with the owner's possession of that portion of the land not occupied by the building. (See sec. 9, chap. 100, Laws of 1876.)

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

FILED, MAY 13, 1889.

THIS is an action in equity to foreclose a mechanic's lien for certain lumber furnished by the plaintiffs to the defendants for the erection of a livery barn. There was a decree for the plaintiffs. Defendants appeal.

H. H. Roadifer, for appellants.

John A. Berry, for appellees.

ROTHROCK, J.—I. It is claimed in behalf of appellants that the plaintiffs did not prove that the lumber was furnished upon a contract, as alleged, and that the

evidence showed that the same was furnished by C. F. Luce, and not by the partnership of C. F. Luce & Co. We must decline to enter into a discussion of these questions. The record and evidence show unmistakably that C. F. Luce & Co. sold the lumber to George O. Curtis, to build the barn; that no part of the price thereof has been paid; and that the plaintiffs are entitled to a mechanic's lien therefor. To discuss these questions would be trifling with the administration of justice.

II. The defendant A. L. Harvey is the holder of a purchase-money mortgage upon the lots upon which the barn is situated, and the court held that his lien was prior and superior to the lien of the plaintiffs upon the lots, and that plaintiffs' claim was the paramount lien on the barn. A special execution was ordered for the sale of the barn, and it was further ordered that, if said Harvey failed to redeem from the sheriff's sale within one year, the purchaser of the barn might remove the same from the lots within thirty days thereafter. Afterwards the decree was modified as to the manner of sale, by directing that the sheriff's sale, as between the plaintiffs and the defendants Curtis & Curtis, should be the same as the sale of personal property, and that the sheriff should give a bill of sale to the purchaser, and place the purchaser in possession of the same, but that the barn should not be removed from the lots until the expiration of the year in which Harvey was entitled to redeem. Harvey does not complain of the decree. The defendants Curtis & Curtis claim that under the decree they are deprived of the right of redemption provided by law in case of the sale of real estate. It is provided by section 2135 of the Revised Code (sec. 9, ch. 100, Laws of 1876), that "if such material was furnished or labor performed in the erection or construction of an original and independent building, erection or other improvement, commenced since the attaching or execution of such prior lien, encumbrance or mortgage, the court may, in its discretion, order and direct such building, erection or improvement to be separately sold

under execution, and the purchaser may remove the same within such reasonable time as the court may fix." It will thus be seen that, as between the holder of the mechanic's lien and the owner of the building, it is treated as personal property. No right of redemption is provided for, as in case of real estate. The sale is absolute, and the removal to be made within a reasonable time. It is only when there is a prior lien upon the land that the court is authorized to order a sale of the building alone. In such case the lien should be established against the land and the building, that the right of redemption may not be defeated. *Early v. Burt*, 68 Iowa, 716.

It is further claimed that the decree is erroneous, in that it authorizes the sheriff to put the purchaser in possession of the barn without removing it, and thus deprives appellants of the possession of the lots during the period of redemption allowed to Harvey. We do not think appellants can complain of this part of the decree. The only interference with the possession of the lot is of that part upon which the building stands. This was probably a concession to Harvey, who is the holder of the prior lien on the lots. As between him and the appellants, the barn was real estate. In view of all the facts of the case, we think that part of the decree which provides for possession by the purchaser is equitable and just. It does not appear that appellants will be prejudiced thereby.

AFFIRMED.

ZIMMERMAN V. THE MERCHANTS AND BANKERS' INSURANCE COMPANY.

1. **Appeal: AMENDED ABSTRACT NOT DENIED TAKEN AS TRUE.** The appeal in this case was based upon alleged errors in instructions. Appellant's abstract nowhere showed that the instructions were filed, and an additional abstract by appellee stated in terms that the pretended instructions set out in the abstract were never written out, signed by the judge and filed in the case. To this there was no denial. *Held* that the additional abstract must be taken as true, and the alleged instructions stricken out of appellant's abstract, on motion to that effect.
2. ———: **DEFECTIVE ABSTRACT: DISMISSAL.** Where an appeal is properly perfected, it will not be dismissed on account of a defect in the record, but the judgment will be affirmed or reversed, as the record will justify.

Appeal from Delaware District Court.—HON. JOHN J. NEY, Judge.

FILED, MAY 13, 1889.

ACTION on a policy of insurance. There was a judgment for plaintiff, and the defendant appeals.

Baker & Haskins, for appellant.

J. H. Trewin and Fouke & Lyon, for appellee.

GRANGER, J.—Appellee moves to strike from appellant's abstract what purports to be the instructions of the court, on the ground that they constitute no part of the record, not having been filed in the cause nor preserved by a bill of exceptions. There is no bill of exceptions in the case, and appellant's abstract nowhere shows that the instructions were filed, and an additional abstract by appellee states in terms that the pretended instructions set out in the abstract were never written out, signed by the judge and filed in the case. To this

Ressegieu v. Van Wagenen.

there is no denial by appellant, and it is to be taken as true; but, if we were to take the contradictory statements as presenting an issue as to the true state of the record in this respect, there is nothing from which we could determine the question. When the abstracts of parties present an issue of fact as to the state of the record in a law action, we must look to the bill of exceptions to settle the question, and it is the duty of appellant to furnish that record. Under this state of facts we must regard the instructions in the abstract as no part of the record, and the motion to strike the instructions from the abstract is sustained. *Mudge v. Agnew*, 56 Iowa, 297.

Appellee also moves to dismiss the appeal for the same reason. The appeal seems to have been properly perfected, and in such a case it is not our practice to dismiss an appeal merely because of a defective record, but to affirm or reverse, as the record of the cause will justify.

The only errors assigned in the case are as to the giving of the instructions; and, as under the ruling they are no part of the record, the assignment cannot be considered, and the judgment is

AFFIRMED.

RESSEGIEU v. VAN WAGENEN *et al.*

Mortgage: FORECLOSURE: ILLEGAL CONSIDERATION: BURDEN OF PROOF: EVIDENCE. In an action to foreclose a mortgage against the grantee of the mortgagor, who has assumed the payment of the mortgage, and who sets up as a defense that the notes were given for intoxicating liquors sold contrary to law, and that therefore no recovery can be had thereon, the defendant has the burden of proof to establish such defense, but he fails so to do in this case.

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED MAY 13, 1889.

ACTION in equity to recover the amount due on two promissory notes, and to foreclose a mortgage given to secure the payment of the same. A decree was rendered in favor of plaintiff as prayed. The defendants appeal.

Van Wagenen & McMillen, for appellants.

John N. Weaver, for appellee.

ROBINSON, J.—On the fifth day of February, 1885, N. P. and Hansine Mortensen made to plaintiff two promissory notes for \$413.65 each, and to secure their payment executed a mortgage on certain real estate in the town of Rock Rapids. The Mortensens afterwards sold and conveyed the mortgaged property to defendant I. W. Van Wagenen. In the deed of conveyance was inserted a stipulation by virtue of which Van Wagenen assumed and agreed to pay the mortgage aforesaid. The defendants I. W. Van Wagenen and wife allege as a defense that the consideration of the notes in suit was intoxicating liquors sold to the Mortensens contrary to law.

I. It appears that the notes in suit were given in payment of two other notes, one of which was secured by a mortgage on the property involved in this suit, and the other was secured by a mortgage on property in Valley Springs, Dakota. It is claimed by defendants that the original notes were given for intoxicating liquors sold by plaintiff in violation of the laws of Iowa. During a portion of the years 1882 and 1883, N. P. Mortensen was engaged in the saloon business in Rock Rapids, Iowa, and Valley Springs, Dakota. He was associated in the business with one Belfry. While they were so engaged in business plaintiff sold and shipped to them merchandise of various kinds, including considerable quantities of intoxicating liquors. The business carried on at Rock Rapids was illegal, so far as it related to the sale of intoxicating liquors, while that carried on at Valley Springs was conducted under

Ressegien v. Van Wagenen.

a license issued by proper authority, and appears to have been legal. The defendants show the sale and shipment to Mortensen of intoxicating liquors at different dates. The plaintiff testifies that all intoxicating liquors sold were paid for in cash, and that sales of such liquors formed no part of the consideration of either of the original notes. Mortensen corroborates plaintiff, and testifies that one of those notes was given for "saloon fixtures and tables," and that the other was given for borrowed money, and other legal considerations. There is some conflict between the testimony of plaintiff and Mortensen in regard to matters of minor importance, but they agree that neither note was given in whole or in part for intoxicating liquors. Defendants rely upon certain inconsistent and improbable matters of evidence in connection with the sales proven. The evidence would not be of general interest, and need not be set out. It is sufficient for us to say that in our opinion the preponderance of the evidence introduced is with the plaintiff, while the burden of proof as to the alleged illegality of the notes is upon the defendants.

II. The purchase price which Van Wagenen agreed to pay for the mortgaged property was seventeen hundred dollars, from which the amount of the notes in suit was deducted in consequence of his agreement to assume and pay them. Mortensen is not contesting the notes. It is insisted by appellee that section 1550 of the Code does not apply to cases of this kind; but we do not find it necessary to decide whether it does or not, since the conclusion we have reached on the other branch of the case is conclusive as to plaintiff's right of recovery. No objection is made to the decree in case plaintiff is found to be entitled to recover. It is therefore

AFFIRMED.

77	354
92	639
77	354
105	18

CASSIDY V. WOODWARD.

1. **Appeal: ABSTRACT DENIED AS TO IMMATERIAL POINT: QUIETING TITLE: EVIDENCE.** On an appeal from a judgment quieting title in defendant, plaintiff states in her abstract that deeds from R., under whom both parties claim, through intermediate grantors down to her, were introduced in evidence, and defendant in an additional abstract denies this statement, and asks that the appeal be dismissed on the ground that plaintiff has not shown any ground for her claim of title. But it appears that there was an abstract of title exhibited with the petition, which showed a line of conveyances from the government, through R., down to plaintiff, and that it was conceded all through the trial that conveyances were made as set out in the abstract. In this state of the case, *held* that it was not necessary for plaintiff to introduce her deeds in evidence, and the motion to dismiss is overruled.
2. **Parties to Actions: TRUSTEE WITH LEGAL TITLE: QUIETING TITLE.** Under section 2544 of the Code, the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name. (See cases cited in opinion.) And the fact that the plaintiff in this action to quiet title paid nothing for the conveyance to her, and that her counsel paid the consideration, and had the conveyance made to her, even without her knowledge at the time, is no defense to the action.
3. **Attachment: ABSCONDING DEBTOR SERVED BY PUBLICATION: PERSONAL JUDGMENT VOID.** A personal judgment rendered against an absconding and non-resident debtor, served by publication only, in an attachment proceeding, is absolutely void, and a sale of real estate thereunder is unauthorized and illegal, and confers no title upon the purchaser or his grantees. (See *Lutz v. Kelly*, 47 Iowa, 807; *Smith v. Griffin*, 59 Iowa, 409.)
4. **The Same: VALIDATION OF SALE BY RECITAL IN SHERIFF'S DEED.** In such case, a recital in the sheriff's deed that the sale was made pursuant to "the written notice of the defendant that he elected to have said real estate sold subject to redemption," did not have the effect to validate the judgment and sale.

Cassidy v. Woodward.

5. **The Same:** SUBSEQUENT NUNC PRO TUNC JUDGMENT IN REM: NOTICE BY PUBLICATION: PARTIES. Twelve years after such void judgment was rendered, and after defendant therein had conveyed the land attempted to be sold thereunder, the attachment plaintiff, who had bid in the land, began an action upon notice by publication against the attachment defendant, and procured a *nunc pro tunc* judgment *in rem* against the land. *Held* that this was of no avail as against said defendant's grantee of the land, because (1) The defendant therein had no longer any interest in the land, and the notice by publication was not authorized, and gave the court no jurisdiction (Code, sec. 2618); (2) The proceeding was not for the purpose of correcting a mistake in a judgment, but to substitute a judgment *in rem* in the place of a personal judgment long before rendered and approved and signed by the judge, and was therefore without warrant; (3) The grantee was not made a party to such proceeding, and was therefore not bound thereby.
6. **Taxes:** PAYMENT UNDER CLAIM OF TITLE UPON ANOTHER'S LAND: RECOVERY. In an action to quiet title against one who claims title under a judicial sale which is adjudged to be void, and who has paid the taxes on the land under such claim, the decree quieting the title in plaintiff should award defendant judgment for the money so paid, with six per cent. interest on the several payments, and the same should be made a lien on the land.

Appeal from Sioux District Court—HON. C. H. LEWIS,
Judge.

FILED, MAY 13, 1889.

THIS is an action in equity, and it involves the title and ownership of eighty acres of land in Sioux county. There was a trial upon the merits, and the plaintiff's petition was dismissed, and a decree entered quieting the title in the defendant. Plaintiff appeals.

Rickel & Crocker and *J. W. Bull*, for appellant.

Argo & McDuffie and *Struble, Rishel & Hart*, for appellee.

ROTHROCK, J.—I. Both parties claim title to the land under one Gabriel T. Rock. The plaintiff's

Cassidy v. Woodward.

1. **APPEAL:** abstract denied as to immaterial point: quieting title: evidence. alleged title consists of a regular chain of conveyances from Rock through several intermediate grantors. The defendant's alleged title is based upon a sheriff's sale of the land upon an execution on a judgment against said Rock.

The first question necessary to be determined is an objection made by appellee to appellant's abstract. It is claimed that the statements in the abstract, showing that deeds of conveyance from Rock through the intermediate grantors down to the plaintiff were introduced in evidence, is not true, and that the plaintiff has no standing in court, because she failed to show that she has even any pretended title. We have not thought it necessary to investigate the record in order to determine whether the said deeds were formally introduced in evidence, because, under the record as made by the pleadings and other evidence, it was not necessary that plaintiff should have offered said deeds in evidence. There was an abstract of title exhibited with the petition, which showed a line of conveyances from the government, through said Rock, down to the plaintiff. The defendant by her answer denied the averments of the petition, except as admitted. There were amendments made to the answer. In the several answers, and in oral evidence introduced on the trial to which there was no objection, it was either admitted or plainly shown that the plaintiff held by a regular chain of conveyances from Rock to her. All through the trial it appears to have been conceded that the conveyances were made as set out in the abstract of title attached to the petition. We do not feel called upon to more than state our conclusion upon this branch of the case. It is wholly unnecessary to set out the pleadings and evidence upon which the conclusion is based. The appeal cannot be dismissed and the case disposed of in this court on this objection.

II. It is claimed in the answer, and strenuously urged by counsel for appellee, that the plaintiff is not

Cassidy v. Woodward.

2. PARTIES to
actions: trustee with legal
title: quieting title.

the real party in interest; that the real parties are the counsel in the case; and that they bought the land and took the title in the name of the plaintiff, who is a servant in the family of one of the counsel; and that the purchase of the land was a fraud and a conspiracy on the part of plaintiff's counsel; and that the claim made by plaintiff for the land is against public policy and good morals. It is true that the plaintiff's counsel purchased the land and paid for it and had the conveyance made to plaintiff, a servant in one of their families. There is no evidence that they discovered the alleged defect in the plaintiff's title. On the contrary it appears that Rock conveyed the land to one Marbourg, and he conveyed it to one Pitts, and Pitts conveyed it to the plaintiff. It is true, as claimed by the defendant, that actions must be prosecuted in the name of the real party in interest, excepting in certain cases. Code, sec. 2543. The exceptions are set forth in section 2544, which is in these words: "An executor or administrator, a guardian, a trustee of an express trust, a party with whom, or in whose name, a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the suit is prosecuted." It has uniformly been held by this court that, under this provision of the Code, the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name. *Cottle v. Cole*, 20 Iowa, 481; *Rice v. Savery*, 22 Iowa, 470; *Pearson v. Cummings*, 28 Iowa, 344; *Knadler v. Sharp*, 36 Iowa, 232; *Vimont v. Railway Co.*, 64 Iowa, 514. The plaintiff stands in the place of Marbourg, who was the grantee of Rock, and of Pitts, her grantor; and the fact that she paid nothing for the conveyance, and that her counsel paid the consideration and had the conveyance made to her, even without her knowledge at the time, is no defense to the action.

III. We come now to the merits of the case. The defendant must fail in the action, unless she acquired

Cassidy v. Woodward.

8. ATTACH-
MENT: ab-
sconding
debtor served
by publi-
cation: per-
sonal judg-
ment void.

the title to the land through the judgment against Rock, and the levy and sale thereunder. The facts with reference thereto are as follows: Rock was indebted to a partnership under the name of Hall & Woodward, upon two promissory notes payable at Le Mars, in Plymouth county. Action was commenced on these notes in the Plymouth circuit court, in the year 1874. It was averred in the petition that Rock, the defendant, had absconded, so that the ordinary process could not be served upon him. A writ of attachment was issued, directed to the sheriff of Sioux county, and service was made thereof by levying on the land in controversy and another tract of land. Service of notice of the action was made by publication in a newspaper. On the twelfth day of May, 1874, the said circuit court rendered a judgment against said Rock for the amount of the note, interest and costs. The judgment was by default, and recited that the defendant therein "had received due and legal notice of the pendency of the action by publication." No reference is made to the attachment in the record entry. It was a personal judgment in the same form as would have been proper if the defendant in the action had been personally served with an original notice. The record was read, approved and signed by the judge in open court, December 7, 1874. A general execution was issued on the judgment on the twenty-seventh day of June, 1874, directed to the sheriff of Sioux county, who levied the same upon the land in controversy, and the other tract above mentioned, and sold the same to Hall & Woodward, plaintiffs in execution, and delivered to them a certificate of purchase. At the expiration of one year allowed for redemption, a sheriff's deed was executed and delivered to Hall & Woodward, the purchasers. The defendant claims title under this judgment, levy and sale.

The personal judgment was absolutely void. It should have been *in rem* only, and should have directed the sale of the attached property. A personal judgment rendered against an absconding and non-resident debtor,

Cassidy v. Woodward.

upon service by publication, is absolutely void, and a sale of real estate thereunder is unauthorized and illegal. Such a service invests the court with power and jurisdiction to appropriate property over which jurisdiction has been acquired by attachment or otherwise. *Lutz v. Kelly*, 47 Iowa, 307; *Smith v. Griffn*, 59 Iowa, 409. The last case is identical with the case at bar. The action was aided by attachment, which was levied upon the land; service was made by publication only; a personal judgment was rendered against the defendant, on which the land was sold; and it was held that the judgment was void for want of jurisdiction; and the sale of the land thereunder was also void, and the judgment was set aside, and the sale canceled at the suit of the defendant in execution against the heirs of a grantee by deed, with covenant of general warranty from the purchaser at the sheriff's sale. Following the above cases, and others which might be cited, it must be held that the judgment and sale relied upon by the defendant in this case are void, and are no defense to the plaintiff's action.

IV. It is insisted by counsel for the defendant that the plaintiff was charged with notice of defendant's rights by a recital in the sheriff's deed, which is as follows: "And whereas, the said Nicholas Jongewaard, as sheriff aforesaid, in pursuance of the notice of sale aforesaid, in conformity to law, and by virtue of said execution, and the written notice of the defendant that he elected to have said real estate sold subject to redemption," etc. It is claimed that the recital that Rock gave the sheriff written notice to sell subject to redemption cured any defect in the prior proceedings, so as to charge the plaintiff with notice, and defeat her title. It does not appear that there was any such notice, except by the above recital. The claim that it cured and made valid the void judgment and sale is, we think, giving this mere recital as to the proceedings attending the levy and sale too much significance. It

4. THE same:
validation of
sale by re-
cital in sher-
iff's deed.

would be an attempt to make a void judgment valid by an act of the defendant thereto, having no reference to the judgment.

V. After the evidence in the case was introduced, the defendant filed an amendment to her answer by way of a plea in abatement, in which she set forth that the clerk of the Plymouth circuit court failed to enter a judgment *in rem* against the property in question, and that judgment was actually rendered against the real estate described in the petition in this action. It was further averred in the said amendment that Hall & Woodward had commenced an action in said court, demanding that the clerk be ordered to enter the said judgment in the judgment record of said court as of the date at which the same was rendered, to-wit, May 12, 1874. A demurrer to this amendment to the answer was overruled, and the final hearing of the cause was postponed until said action, upon which the plea in abatement was founded, could be determined. Afterwards the said suit was determined, and the defendant presented a record, from which it appears that notice of the action was served upon said Rock by publication, and that upon default a *nunc pro tunc* judgment was rendered against him, being a judgment *in rem*. It is claimed that this *nunc pro tunc* judgment is a good defense to the plaintiff's action. We think it cannot have that effect, for reasons which may be very briefly stated: (1) Rock had no interest in the land when the supplemental action was commenced, and service upon him by publication was not authorized by law. Code, sec. 2618. He had parted with all claim to the land by his conveyance. (2) The proceeding was not for the purpose of correcting a mistake in a judgment. It was an attempt to substitute a judgment *in rem* in place of a personal judgment rendered some twelve years before that time, and read and approved and signed by the judge who presided in the court at the time. (3) The plaintiff herein was not made a party to the *nunc pro tunc* proceeding, and her rights are in no

5. THE same:
subsequent
nunc pro tunc
judgment in
rem: notice
by publica-
tion: parties.

Jones v. Blumenstein.

manner affected by it. In our opinion, the decree of the district court cannot be sustained.

VI. The defendant averred in her answer that she had paid all of the taxes on the land in controversy from the time of the conveyance thereof to her. Her answer is in the nature of a cross-bill, and demands that her title be quieted, and for such other and further relief as the court may adjudge to be just and equitable in the premises. Under this prayer she is entitled to be reimbursed for the taxes paid by her, with six per cent. interest thereon from the time of the respective payments, and the decree should provide that the same shall be a lien upon the land. Evidence was introduced showing the amount of said taxes, which will be found on page forty-one of appellant's abstract.

REVERSED.

JONES V. BLUMENSTEIN *et al.*

1. **Appeal: AMOUNT INVOLVED: INTEREST IN REAL ESTATE: COLLATERAL CONTROVERSIES.** An action to quiet title as against a sheriff's deed, on the ground that the property was plaintiff's homestead, "involves an interest in real estate," and therefore this court has jurisdiction of an appeal without a certificate, regardless of the amount involved; and controversies between the appellant and other defendants, being incident to the main issue, must follow the appeal, regardless of the amount involved in such controversies.
2. **Homestead: ABANDONMENT: EVIDENCE.** What other persons may have said as to the intention of the owner of a homestead to return to it, and what one who purchases it at execution sale believes about it when he purchases, cannot be admitted in evidence against the owner to prove an abandonment.
3. **Judgment: CAPACITY OF PLAINTIFF: ESTOPPEL.** Where an executor takes judgment in his own name on an account due to the estate, and he collects the amount thereof, and for a legal reason he is required to refund the money, he is estopped from questioning the judgment for the purpose of avoiding personal liability for the money received.

77	361
80	497
77	361
93	689
77	361
96	838
77	361
114	442
77	361
127	525

4. **Homestead: ABANDONMENT: WHAT IS NOT.** The absence of a widow from her homestead for eight months to live with and visit her daughter, and care for her during confinement,—the property in the meantime being rented, but the owner's furniture being left therein, except such articles as she desired to take with her for use,—does not constitute an abandonment, in the absence of any evidence of her intention not to return. (See cases cited in opinion.)
5. ———: **CEASING TO BE HEAD OF FAMILY: WHAT IS NOT.** A widow occupying a homestead does not cease to be the head of the family, and therefore lose her right to the homestead, by the fact that her married daughter and her husband are taken into the house and reside with her.
6. ———: **PURCHASE AT SHERIFF'S SALE: CAVEAT EMPTOR: ESTOPPEL.** One who purchases a homestead during the owner's absence, knowing that it has long been the homestead, and that the owner has left a part of her furniture in the house, cannot claim that he was so misled by her absence as that she should be estopped from asserting her homestead right. The doctrine of *caveat emptor* applies to such a purchase. (See opinion for citations.)
7. ———: **EXECUTION SALE VACATED: PURCHASER'S RIGHT AS AGAINST EXECUTION CREDITORS.** Where a homestead was sold in satisfaction of judgments which were not liens on it, and the sale was vacated, the purchaser was not entitled to have assigned to him the judgments which were paid with the purchase money, but he was entitled to have the money refunded to him, with interest, by the judgment creditors who received it. (See Code, sec. 3090.)

Appeal from Washington District Court.—HON. D.
RYAN, Judge.

FILED, MAY 13, 1889.

THE plaintiff, being the owner in fee of certain adjoining lots, not exceeding five hundred dollars in value, asks to be quieted in her title thereto, as against a sheriff's sale and deed thereof to defendant Blumenstein, on an execution against her in favor of one John Reisman. She asks this relief on the grounds that the property was and is her homestead. The defendant Blumenstein denies that the property was or is her homestead, and alleges that, if it ever was, she abandoned it before the sale to him; that due notice of said sale was given, and that he purchased in good faith, and without any knowledge that plaintiff had or claimed a homestead in the

Jones v. Blumenstein.

property ; wherefore he says she is estopped from now asserting such claim, and asks for possession, and that he be quieted in his title. The defendant Blumenstein, by way of cross-petition, makes Ellen Reisman, executrix of the estate of John Reisman, deceased, and William Singleman, defendants ; and alleges that \$72.85 of the money paid by him as the purchase price of said property was received by John Reisman, deceased, and \$44.06 by William Singleman, as judgment creditors of the plaintiff ; wherefore he prays that, in case said sale and deed are set aside, he recover from said parties, respectively, the sum paid to them, with six per cent. interest, from October 31, 1885, with costs. Singleman, answering, admits that he received sixteen dollars of said money on his own account against the plaintiff, and about eighteen dollars on a claim against her in favor of the estate of William Voss, and that the eighteen dollars has been paid out in the settlement of said estate. Ellen Reisman, executrix, etc., answers, admitting that she is executrix, and denying the other allegations of the cross-petition. She alleges that William Singleman received sixty dollars of said purchase money, and that twenty dollars is in the hands of the clerk of the court ; wherefore she asked to be dismissed, or, if held liable, that William Singleman for himself, and as administrator of the estate of Voss, be required to pay his *pro rata* share. On the final hearing, decree was entered setting aside the sale and deed to Blumenstein, and the satisfaction of the judgments, and ordering that the judgments not belonging to Blumenstein be assigned and transferred to him by the clerk of the court ; that the plaintiff pay five dollars of the costs ; that Singleman and Reisman each pay all costs made by them ; and that Blumenstein pay all other costs ; to which decree all the parties at the time duly excepted, and the defendant Blumenstein perfected his appeal to this court. Singleman and Reisman each moved to dismiss the appeal, on the grounds that the amount in controversy between them, respectively, and the appellant does not exceed one hundred dollars, and because, as between

Jones v. Blumenstein.

them and appellant, no interest in real property is involved, and no question has been certified for the opinion of this court.

C. C. Patterson, for appellant Blumenstein.

Dewey & Eicher, for Susan Jones and William Singleman, appellees.

C. J. Wilson, for Ellen V. Reisman, executrix, appellee.

GIVEN, C. J.—I. The motion to dismiss the appeal must be overruled. The case “involves an interest in real estate.” The plaintiff and defendant Blumenstein each claim title to the property in question, and each asks to be quieted in that title. The controversy as to the defendants Singleman and Reisman is incident to the main issue, and must follow the appeal.

II. On the hearing, objections were made by plaintiff to certain parts of the testimony of defendants Blumenstein and Singleman, wherein they stated what other persons had said as to plaintiff’s not intending to return to the property at the time she went to North English, and as to what Blumenstein believed about it when he purchased. These statements did not purport to have been made by the plaintiff to third persons, and were therefore inadmissible, and the objections were well taken.

III. Singleman testified, subject to objection, that \$16.12 of his judgment against the plaintiff was on his individual account, and \$18.89 on account was due to the estate of Voss. If, as indicated in the record, Singleman took judgments in his own name on both accounts, the objection should be sustained; for he will not now be permitted to question the judgment for the purpose of avoiding personal liability for the money received, and, if he took separate judgments, they are the best evidence of their respective amounts.

1. APPEAL:
amount in-
volved: in-
terest in real
estate: col-
lateral con-
troversies.

2. HOMESTEAD:
abandon-
ment: evi-
dence.

3. JUDGMENT:
capacity of
plaintiff:
estoppel.

Jones v. Blumenstein.

IV. The right of plaintiff to be quieted in her title and possession depends entirely upon whether it was her homestead at the time of the sale to Blumenstein. It appears from the testimony that the plaintiff purchased the property about the tenth of February, 1871, and resided there with her husband until his death, March 8, 1871; that she continued to reside thereon up to August, 1885, —her son-in-law and daughter residing with her for some time prior to August, 1885, they living together as one family; that in August, 1885, Mr. Nettifee, the son-in-law, having found employment at North English, moved to that place, the plaintiff going with them, to be with her daughter during confinement; that they remained there about eight months, when she and her daughter returned to the property in question. At the time that plaintiff left for North English, she rented the property to one Schauff, leaving part of her furniture in the house, and taking such articles along as she would need. The plaintiff testifies that it was her intention to make a visit as long as she wanted, and return home when she pleased. Nettifee testified that he did not move to North English to stay, but took his wife there so he could look after her during her sickness. There is an entire absence of any testimony showing that the plaintiff ever expressed any other intention than to return to the property in question. It is claimed that, by taking the family of her son-in-law to reside in the premises, he, and not she, was the head of the family. Had she continued to reside there alone after her husband's death, her right to hold it as a homestead, under section 1989, would not be questioned. We hold that receiving the family of her daughter into the home, and living as they did, was not an abandonment of the plaintiff's homestead right. It is claimed that her removal to North English was an abandonment of her homestead. As already stated, there is an entire absence of any testimony showing that the plaintiff ever expressed any intention to abandon the homestead, and

4. HOMESTEAD: abandonment: what is not.

5. —: ceasing to be head of family: what is not.

there is nothing in the facts and circumstances of her absence to show such an intention, but, on the contrary, they indicate an intention to return and dwell in the property. See *Fyffe v. Beers*, 18 Iowa, 4; *Morris v. Sargent*, 18 Iowa, 90; *Davis v. Kelley*, 14 Iowa, 523; *Robb v. McBride*, 28 Iowa, 386; *Shirland v. Bank*, 65 Iowa, 96.

V. It is also claimed that as due notice was given of the sale, and the defendant Blumenstein purchased in good faith without knowledge of the plaintiff's claim, she is estopped from asserting the claim to the homestead. The doctrine of *caveat emptor* applies to purchasing at sheriff's sales. *Hamsmith v. Espy*, 19 Iowa, 444; *Holtzinger v. Edwards*, 51 Iowa, 384. Blumenstein shows in his testimony that he knew that the plaintiff had resided in the property for eleven years previous, and that she had left some articles there when she went to North English. We fail to see anything in the acts of the plaintiff to justify the belief that she had abandoned the homestead, or was in any wise consenting to the sale thereof, or the disposition of the proceeds.

VI. We are unable to discover upon what theory the court decreed that the judgments not belonging to Blumenstein should be assigned to him.

7. —: execution sale vacated: purchaser's right as against execution creditors. Having set aside the sale, it was proper to set aside the satisfaction of the judgments, so far as the same had been made by applying the purchase money. If the judgments were not a lien upon the property in question because of its being a homestead, and that fact was unknown to Blumenstein, he has a right to have Singleman and Reisman refund the purchase money received by them, under the provisions of section 3090 of the Code.

The decree of the district court is affirmed in all respects, except in so far as it orders an assignment of the judgments to Blumenstein; and, as there was no finding as to the amount of purchase money received by Reisman and by Singleman, the case will be remanded

Luce v. Moorehead.

for further hearing as to said amounts, and for judgments against Reisman and against Singleman in favor of the defendant Blumenstein, for the amounts which it may be found they respectively received, with six per cent. interest and increased costs; the defendant Blumenstein to pay the costs of this appeal.

MODIFIED AND AFFIRMED.

LUCE V. MOOREHEAD *et al.*

77	367
115	448

1. **Chattel Mortgage of Growing Crops: INSUFFICIENT DESCRIPTION: ACTUAL NOTICE TO PURCHASER OF LAND.** The owner of land, after mortgaging his growing crops, sold the land, while the crops were still growing, to plaintiff, and then took a lease of the land from her. Conceding that the description of the property in the mortgage was so indefinite that the record of it did not impart constructive notice to third persons, yet, since it appears that plaintiff had actual knowledge of it, and of the property which it was designed to cover, *held* that the claim of the mortgagee to the crops was good as against her. (See opinion for cases cited.)
2. ———: **NOTICE TO PURCHASER OF LAND: EVIDENCE.** To prove actual notice to the plaintiff, in such case, of the mortgage in question, defendant was permitted to introduce in evidence several mortgages executed by the mortgagor, to persons not parties to the action, for crops grown on the land. *Held* that in this there was no error, because the evidence tended to show that, during the negotiations resulting in the conveyance to plaintiff, she was fully advised of such mortgages, and of the uses to which the crops were devoted; wherefore the mortgages, and what was said about them during the negotiations, became material.

Appeal from Harrison District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MAY 13, 1889.

ACTION to recover the value of certain corn alleged to have been wrongfully converted by defendant George P. Moorehead to his own use. R. B. Hillis intervened. There was a trial by jury, and a verdict in favor of defendant as against the plaintiff, and in favor of the intervenor as against defendant. Judgment was rendered in accordance with the verdict. Plaintiff appeals.

H. H. Roadifer and J. W. Barnhart, for appellant.

S. H. Cochran, for appellee.

ROBINSON, J.—On the third day of April, 1886, Ira E. Lake executed and delivered to defendant Moorehead, to secure the payment of a promissory note for two hundred dollars, a mortgage upon certain stock, and also upon “all crops growing and to be grown on the west half of the northwest quarter of section nine, township eighty-one, range forty-one. At that time Lake owned the land described, and had planted eight or ten acres of it to wheat. Between the eighth and sixteenth days of May, 1886, he planted thereon the corn from which the crop in controversy grew. On the eighteenth day of May, 1886, he sold and conveyed the land to plaintiff, and received from her a lease of the same and other land for the term of three years. Of the rents provided for by the lease four hundred dollars was due, and payable on the first day of February, 1887, but has not been paid. Lake delivered to Moorehead, to pay the indebtedness secured by the mortgage to him, about or during the month of January, 1887, six hundred and ninety-seven bushels of corn raised during 1886 on the land last described in the Moorehead mortgage, and eighty-five bushels raised on the other land described in the lease, to-wit, the east half of said quarter section. Intervenor Hillis held a mortgage on all corn grown on the land described, and claimed and recovered judgment for the eighty-five bushels of corn raised thereon and delivered to Moorehead as aforesaid. On a former submission of

this cause an opinion based in part upon a misapprehension of some of the facts involved was filed. A rehearing was granted, and the cause has been again submitted for our determination.

I. It is contended by appellant that the mortgage to Moorehead was void as to the corn in controversy for uncertainty of description; and the cases of

1. CHATTEL mortgage of growing crops: insufficient description: actual notice to purchaser of land.

Pennington v. Jones, 57 Iowa, 37; *Engert v. White*, 59 Iowa, 464; and *Barr v. Cannon*, 69 Iowa 20, are relied upon as supporting her claim. In the case first named the description in the mortgage was "about fifty acres of wheat; twenty acres of oats; also twelve acres of barley, and twenty acres of corn; also two acres of buckwheat, to be sown and raised on the land leased of Barber, McDowell & Co." This court held the description insufficient as against third persons because the mortgage did not state that the crops were to be grown on the leased premises, nor that all the crops to be grown for a specified number of years were mortgaged. In the second case named, the mortgage described the property as "all and the entire crop of flax and wheat and other grain or produce raised on the east half," etc. The description was held to be too indefinite and uncertain because it did not describe or refer to crops growing when the mortgage was executed, and for the further reason that it did not appear when the crops were "raised." In the third case cited, the property described was "all the grain, oats, wheat, flax and corn raised" on certain land. The description was held to be insufficient because it failed to state the year or time in which the grain was to be raised. It has been held by this court that, where the description in a chattel mortgage is so indefinite and uncertain that the recording thereof will not impart constructive notice, yet such a mortgage is not void, but, on the contrary, is good as to all persons having actual notice of its existence, and the intent as to the property which it was designed to include. *Plano Manuf. Co. v. Griffith*, 75 Iowa, 102; *Clapp v. Trobridge*, 74

Luce v. Moorehead.

Iowa, 550; *Cummings v. Tovey*, 39 Iowa, 195. The mortgage in this case described "all crops growing and to be grown" on the land specified. The description was much more accurate than those in the cases relied upon by appellant. The evidence tended to show that she had actual knowledge of the mortgage, and that it was designed to cover the crop in controversy when she purchased the place and executed the lease to Lake, and the jury were authorized to find that such was the fact. The corn which produced that crop was growing when the purchase from Lake was effected by appellant. Under these circumstances, the mortgage was good against appellant, even if it be conceded that the description was defective, but that we do not determine.

II. Complaint is made that defendant was permitted to introduce in evidence several mortgages executed by Lake to persons not parties to this action, for crops grown on the land leased by him from appellant during the year 1886, and for other property. Some of the evidence tended to show that during the negotiations which resulted in the conveying of that land to appellant, her agent in the transaction was furnished with a statement showing the indebtedness of Lake, the mortgages he had given, and the names of the mortgagees, and that appellant had full knowledge of such mortgages and of the uses to which the crops were devoted. In view of these facts, it was proper to prove what was said about the mortgages while the negotiations were being had. The mortgages in question were so far made a part of the negotiations that their introduction in evidence was proper.

III. The mortgage of intervenor Hillis was recorded in the chattel mortgage records. The sufficiency of the description is not questioned, but it is urged that the record thereof did not impart constructive notice to appellant, therefore that she is entitled to recover the value of the corn raised on the east eighty, which was mortgaged to intervenor. But

2. —: notice
to purchaser
of land:
evidence.

SAME as num-
ber 1.

Luce v. Moorehead.

the evidence shows without contradiction that her attorney examined the chattel mortgage records before her transaction with Lake was closed, and stated to her "the tenor and effect of the chattel mortgages." That she had actual notice of the mortgage to Hillis cannot be seriously questioned. The verdict and judgment as to the property included therein was correct as to appellant.

IV. Other questions presented by argument of counsel need not be determined. We reach the same conclusion which was announced on the first submission, although on a somewhat different statement of facts.

AFFIRMED.

REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DES MOINES, MAY TERM, A. D. 1889.
IN THE FORTY-THIRD YEAR OF THE STATE.

PRESENT:

HON. JOSIAH GIVEN, CHIEF JUSTICE.
HON. JAMES H. ROTHROCK,
HON. JOSEPH M. BECK,
HON. GIFFORD S. ROBINSON,
HON. CHARLES T. GRANGER, } JUSTICES.

FRANCIS V. WALLACE *et al.*

Statute of Limitations: FRAUD IN GUARDIAN'S DEED: WHEN DISCOVERED. Fraud in the conveyance of a minor's land by his guardian, under order of court, is presumed to be discovered when the deed is filed for record; and the ward cannot maintain an action to set it aside, seven years after reaching his majority, and after it would otherwise be barred by the statute of limitations, on the ground that he did not sooner discover the fraud. (Compare *Laird v. Kilbourne*, 70 Iowa, 84.)

77	373
92	428
77	373
108	254
77	373
136	537

Francis v. Wallace.

Appeal from Buchanan District Court.—HON. JOHN J. NEY, Judge.

FILED, MAY 14, 1889.

ACTION to recover the undivided two-thirds of certain real estate of which Martin W. Francis died seized in 1860, leaving Izora A., his widow, and the plaintiff, his only child. Izora married the defendant William A. Burnside, April 5, 1865. Burnside was appointed guardian of the plaintiff,—then seven years of age,—and gave bond, and received letters of guardianship. On June 5, 1865, such proceedings were then and theretofore had in the county court that said court ordered that W. A. Burnside sell and convey said undivided two-thirds of said real estate, in pursuance of which order he sold the same to the defendant Lewis Rickard, on the ninth day of May, 1867, and executed to him a deed therefor, which deed and sale were approved, and the deed duly entered of record. On the same day Izora A. Burnside sold and conveyed her undivided interest to said Rickard. Rickard immediately took possession of the whole of the land, and the same has been continuously held by him and his grantees ever since. The plaintiff came of age in 1879. He left Iowa in 1867, since which he has resided in Fresno county, California. He alleges that his mother and Burnside always told him he had no property in Iowa, and that he never knew to the contrary until within a few months before the bringing of suit. He also alleges that the proceedings in the county court for the sale of said lands were fraudulent and void because no notice thereof was ever served on him, and no guardian *ad litem* was ever appointed to defend said proceedings for him; that no bond was ever given for the proceeds of the sale, and that all said proceedings were fraudulent, void and illegal; that each of the grantees took their deeds with notice of such fraud; and that he had no knowledge thereof until a few weeks before the bringing of this action. The defendants Wallace and Burlingham, answering, admit that Martin

Francis v. Wallace.

W. Francis died intestate, seized of the real estate named, leaving Izora A. Burnside, his widow, and plaintiff, his only child; that the plaintiff's interest in said real estate was sold to Lewis Rickard, as alleged, and that said Rickard and his grantees have ever since occupied the same. They allege that plaintiff's cause of action is barred by the statute of limitations, and set up at length the proceedings in the county court, and ask that defendant Wallace be quieted in his title. On final hearing, decree was entered dismissing the plaintiff's petition, and confirming title to the land in the defendant Wallace, and judgment and execution for costs against the plaintiff, to all of which the plaintiff duly excepted, and from which he appeals to this court.

Woodward & Cook, for appellant.

C. E. Ransier, for appellees.

GIVEN, C. J.—This right of action accrued to the plaintiff, if at all, in 1867. The plaintiff, then being a minor, he had, under section 2535 of the Code, one year after attaining his majority within which to commence the action. He attained his majority in 1879, but did not commence this action until the fourth day of August, 1886. It is claimed that this is an action for relief on the ground of fraud, and that the cause of action shall not be deemed to have accrued until the fraud complained of was discovered by the plaintiff, which he alleges was not until a few months prior to the commencement of this action. The fraud complained of is the deed from Burnside, as guardian, to Rickard, which was filed for record and recorded May 9, 1867. The case is within the ruling in *Laird v. Kilbourne*, 70 Iowa, 84, wherein the court says: "The fraud will be discovered when the fraudulent act is revealed,—made known to the party aggrieved. Notice or knowledge of the act is a discovery of the fraud. The act which is the very foundation of the fraud alleged in this case—indeed, which itself constitutes the fraud complained of—was

Welsh v. The Des Moines Ins. Co.

the deed of Kilbourne to his wife. Plaintiff is chargeable with notice of this act by the record of the deed." See, also, cases cited. We think it appears very clearly that plaintiff's cause of action is barred by the statute of limitations. It is therefore unnecessary to notice the other points in the record. The decree of the district court dismissing plaintiff's petition and confirming title to the land in the defendant R. F. Wallace, and judgment and execution for costs against the plaintiff, are

AFFIRMED.

77	376
107	749

WELSH V. THE DES MOINES INSURANCE COMPANY.

Insurance : NO PROOF OF LOSS : WAIVER : EVIDENCE. In this action on a policy of insurance against damage by lightning, it appears that there was no proof of loss (see same case, 71 Iowa, 337), but plaintiff alleged a waiver of such proof, but the evidence (see opinion) does not tend to establish such waiver, but the contrary. *Held* that the court erred in refusing to direct a verdict for defendant.

Appeal from Boone District Court.—HON. D. R. HINDMAN, JUDGE.

FILED, MAY 14, 1889.

THIS is an action upon a policy of insurance against loss by fire and lightning. The case is before this court for the second time. See 71 Iowa, 337. Since the former appeal there was a trial by jury, verdict and judgment for plaintiff, and defendant appeals.

Cole, McVey & Clark and *E. L. Green*, for appellant.

S. R. Dyer, for appellee.

GIVEN, C. J.—On the former appeal this court held that the evidence failed to show any proof of loss, and that the evidence tending to show a waiver of such

Welsh v. The Des Moines Ins. Co.

proof on the part of the defendant should have been excluded, as there was no allegation in the petition that proofs of loss were waived. The only change in the state of the issues since the former appeal is that the plaintiff, by amendment, alleges that the defendant waived notice and proof of loss, and in support thereof on the trial introduced in evidence a letter dated September 5, 1885, from the secretary of the defendant company to the plaintiff. It is claimed in behalf of plaintiff that the defendant, having received the statements of E. Eatwood, Alf. L. Torblom and E. A. Warren, did by said letter of September 5 waive any further proof of notice and loss. The letter is as follows: "Your favor of second inst. just received, and I must confess to a feeling of surprise that you do not consider the matter of your claim already settled. We sent a representative to your place in your interests as well as those of the company. The evidence gathered by him while there seemed to us most conclusive, and to our minds proof beyond a doubt that the animal died from milk fever, and had not been stricken or injured by lightning. You have the right to reopen this matter, and make proofs of loss, in which you must establish the fact that death was caused by lightning; that you fully sustain your claim by your own statement under oath, substantiated by the sworn evidence of your neighbors, who must be also freeholders." Following the former ruling in this case, we must say that there was no proof of loss, as required by the policy. There being no other evidence of waiver than the letter of September 5, we think that that letter does not only not waive proofs of loss, but advises the plaintiff of her right to reopen the matter and make proofs of loss, and informs her what must be established thereby. See *Cornett v. Insurance Co.*, 67 Iowa, 388. The time for proving loss had not expired at the date of this letter. There being no evidence that proof of loss was made or waived, the plaintiff was not entitled to recover, and the court erred in not sustaining the defendant's motion for verdict.

REVERSED.

SIMMONS *et al.* v. HILL *et al.***Vendor and Vendee : RESCISSION OF CONTRACT : FAILURE OF TITLE.**

H. was in possession of land under a contract of purchase from D., and, representing himself to be the owner of it, he sold it to plaintiffs, taking their notes for the price, and plaintiffs went into possession, and their possession was never disturbed nor questioned. T. afterwards became the owner of both contracts and was able, ready and willing to carry out the contract with plaintiffs. *Held* that plaintiffs could not have their contract rescinded on the ground of the false representations of H. as to ownership, since they had suffered no injury therefrom.

Appeal from Wright District Court.—HON. S. M. WEAVER, Judge.

FILED, MAY 14, 1889.

THIS is an action to rescind a contract in writing for the sale of real estate, and to enjoin the transfer and collection of certain promissory notes given under it, on the grounds that the contract and notes were procured by false and fraudulent representation. The case was submitted to the court, and there was a decree for defendants. Plaintiffs appeal.

J. C. Raymond, for appellants.

Nagle & Birdsall, for appellees.

GIVEN, C. J.—I. The representation alleged is that the defendant Jesse Hill, for the purpose of defrauding the plaintiffs, falsely and fraudulently represented to them that the land was his property, and that he was the sole owner thereof, while in truth and in fact, as he well knew, said land was the property of one Philip R. Dysart. The testimony shows that at the time of making the contract with the plaintiffs, Jesse Hill held

The State v. Roenisch.

the land under a contract of purchase from Dysart, part of the conditions of which had been performed, and part of which was to be performed in the future, and that Hill was in possession of the land; that upon the making of their contract plaintiffs went into possession, and have remained in possession ever since; that the contract between Dysart and Hill, and that between the plaintiffs and Hill, are now owned by defendant Turner, who is able, ready and willing to carry out the contract with the plaintiffs.

II. To entitle the plaintiffs to a rescission of their contract they must not only show that the representation made was false, but that they have been injured thereby. The defendants Jesse Hill and M. M. Turner, the now owner of the contracts, being ready, able and willing to carry out the contract with the plaintiffs, and the plaintiffs being still in undisturbed possession of the land, they have suffered no injury whatever from the representation, and are not, therefore, entitled to any of the relief demanded. The judgment of the district court is

AFFIRMED.

THE STATE V. ROENISCH *et al.*

Appeal: INSUFFICIENT RECORD. This being an equity case for trial *de novo*, and it appearing that the abstracts do not contain all the evidence, and that the translation of the short-hand reporter's notes were not filed in the court below within six months after the rendition of the judgment, no trial can be had in this court, and the judgment must be affirmed.

Appeal from Allamakee District Court.—HON.
CHARLES T. GRANGER, Judge.

FILED, MAY 14, 1889.

77	379
93	681
94	716
77	379
95	70

THIS is an action in equity in the name of the state to enjoin and abate a nuisance which it is alleged the defendants maintained by the unlawful sale of intoxicating liquors. There was a hearing upon the merits, and a decree was entered against the defendan's, and they appeal.

M. B. Hendrick, for appellants.

Stilwell & Stewart, for appellee.

ROTHROCK, J.—The abstract of appellants does not purport to be an abstract of all the evidence in the case. Counsel for appellee filed an abstract in which some evidence is set out, but it is stated therein that the two abstracts, taken together, do not contain all the evidence offered or introduced on the trial. It also appears that the translation of the short-hand notes taken by the reporter at the trial was not filed in the court below within six months from the rendition of the decree. In this state of the record, the cause cannot be heard upon appeal in this court. *Merrill v. Bowe*, 69 Iowa, 653; *Arts v. Culbertson*, 73 Iowa, 13.

AFFIRMED.

THE *ÆTNA* LIFE INSURANCE COMPANY V. HESSER *et al.*

Judgment: TRANSCRIPT: DEFECTIVE INDEX: SUBSEQUENT MORTGAGE: CORRECTION OF INDEX: NOTICE: PRIORITY. Defendant Hesser executed a mortgage on real estate to plaintiff. Prior to that time a judgment had been obtained against Hesser in another county, and a transcript sent to the county where the land was, and it was filed and entered in the index of all liens, but the name of the defendant in the index was so written as to look more like Hesse than Hesser; and after the mortgagee had examined the index for liens against Hesser and found none, and after the mortgage had been executed, the clerk changed the name as it appeared in the index to Hesser, by changing a curve at the end of Hesse, and which he thought was intended for an r, to a plain r. In an action to foreclose the mortgage, a purchaser of the land under the judgment was made a party, and, upon the question of priority, held—

- (1) That the clerk had no authority to change the index, and that it must be regarded as showing a judgment against Hesse and not against Hesser, and that the names are so dissimilar that one looking for encumbrances against Hesser would not be charged with notice or put on inquiry. (See *Thomas v. Desney*, 57 Iowa, 58; *Howe v. Thayer*, 49 Iowa, 154.)
- (2) That plaintiff was justified in relying on the "index of all liens," and was not required to consult other indexes for judgments against the property.
- (8) That the judgment was not a lien as against plaintiff until it was entered in the "index of all liens," as required by Code, section 197; and, *arguendo*, that no judgment is fully rendered so as to operate as a lien until it is entered on the books prescribed by statute.
- (4) That since plaintiff had no actual notice of the judgment, and no constructive notice by record, his mortgage was superior to the title under the judgment.

Appeal from Webster District Court.—HON. J. L. STEVENS, Judge.

FILED, MAY 14, 1889.

ACTION in chancery to foreclose a mortgage. By the decree in this case, the title of the land was declared to be in one of the defendants, under a purchase at a

77	381
104	674
77	381
116	471

77	381
130	368

77	381
132	500

The Aetna Life Ins. Co. v. Hesser.

sale on a judgment which was held to be a lien upon the land prior to plaintiff's mortgage, and that the defendant held the land free from the lien of plaintiff's mortgage. The plaintiff appeals. The facts of the case appear in the opinion.

Albert E. Clarke, for appellant.

Wright & Farrell and *Baker & Ball*, for appellees.

BECK. J.—I. The facts upon which the decisive questions in this case arise are these: The mortgage which plaintiff seeks to foreclose was executed by J. H. Hesser, and conveys certain lands in Webster county. Before the execution of the mortgage a judgment had been rendered against Hesser, and in favor of one Coost, and another by a justice of the peace of Louisa county, a transcript of which had been filed in the office of the clerk of the district court of Webster county, before plaintiff's mortgage was executed and filed for record. Plaintiff insists that its mortgage is the paramount lien, for the reason that defendants' judgment was not shown by the "index of all liens" required to be kept by the clerk of the district court in his office.

II. The decisive question in the case is this: Is plaintiff's mortgage lien superior to the lien of defendants' judgment, on the ground of the absence of an entry thereof upon the index required to be kept by law? The facts upon which this question is to be determined are as follows: Defendants' judgment, it may be assumed, was duly rendered, and a transcript thereof was filed in the clerk's office in Webster county. Plaintiff, however, insists that the judgment was rendered against "J. H. Hesse." We waive inquiry on this point, as it need not be determined, in view of the conclusion we reach on another branch of the case. It is also insisted that the judgment, after being filed in Webster county, was not, before plaintiff's mortgage was executed, entered upon the "index of all liens," required to be kept by Code, section 197, subdivision 8. This position is disputed by defendants. We find the facts to be that

The *Ætna Life Ins. Co. v. Hesser.*

the entry upon this index intended to indicate the judgment gives the name of defendant as J. H. Hesse. The evidence upon this disputed point is as follows: The plaintiff caused an abstract of the title of the land to be made before the mortgage, which was for money loaned, was accepted. The examiner found no lien against Hesser. An agent of plaintiff, to verify the examiner's work, examined the index of the liens, and found nothing against Hesser. They both testify that their examinations were carefully made. The first examiner testifies that some time after, in his presence, the clerk's attention being called to the entry on the index, he changed the name by adding an r to the name Hesse. This evidence is positive, plain and direct. It is sought to be discredited by proof that a person who the witness declares called the attention of the clerk to the name, and saw the change made, was not present. The witness afterwards states that he was not acquainted with the person referred to, and that he might have given the name which was repeated by the witness, or might have stated that he was the agent or representative of a person of that name. But the witness is corroborated by the agent of the plaintiff, who examined the title. He testifies that when the mortgage was executed the name Hesse had no r affixed to it, and that it was afterwards changed by the addition of that letter. But the clerk himself corroborated plaintiff's witness on this point. He testified as follows: "I recollect of some person being in my office about that time, and, in looking up the records in regard to this matter, my attention was called to the name on the lien index. The question arose as to whether the name was Hesse or Hesser. My recollection is that I thought it was Hesser, but made it plainer, by making or lengthening the curve on the last letter, but I cannot now recollect whether it was Mr. Lewis and Mr. Williams who was present in the office, or who it was." Williams, referred to in this testimony, is the examiner of the title, and the witness testifying for plaintiff and Lewis is the person he states was present when the change was made.

The only disagreement between the clerk and plaintiff's witness is that the clerk says the change was simply making the name plainer by "lengthening the curve on the last letter." He admits that there was a change, but wishes it to be understood that it was only a little change. But, according to his own admission, the change was such as to make an r out of a curve, which, to say the least of it, made certain that which even to him was an uncertainty. This was plainly a change of the record, wholly unauthorized and unlawful, if not criminal. No custodian of records is authorized thus to tamper with them. The alteration is to be disregarded, and the record is to be regarded as it stood before it was tampered with. We find it unnecessary to go to the transcript of the record, or to consider certain photographs of the original records. We reach the conclusion that the index was changed upon the evidence before us, as presented in the abstract, which, so far as the facts stated by us are concerned, is not disputed. We are to regard the index as showing a judgment against J. H. Hesse, and not J. H. Hesser.

III. It is plain that the names are so dissimilar that one searching for encumbrances would not be charged with notice of the judgment, or put on inquiry. *Thomas v. Desney*, 57 Iowa, 58; *Howe v. Thayer*, 49 Iowa, 154.

IV. Code, section 197, provides that the clerk of the district court shall keep, as a record of his office, "a book in which an index of all liens in the district court shall be kept." The same statute requires indexes of record books, judgment dockets and of some other records to be kept. These records and the indexes are all to be kept for use, to the end that the proceedings of the court and encumbrances upon property may be readily discovered. It is obvious that the law requires all of them to be correctly kept, and any one consulting the proper index is authorized to rely upon its fulness and correctness.

V. It is plain that the "index of all liens" shows all judgments in the court to which the records pertain. If such liens may be found by consulting other indexes, the searcher is not required to resort thereto after having examined the "index of all liens," for he is authorized to rely upon its fulness and accuracy. The plaintiff, therefore, after having caused this index to be examined, was not required to pursue inquiry through other indexes.

VI. We are required to inquire whether a judgment or transcript of a judgment, found in the records of the clerk's office, is a lien, and operates as notice thereof, if the index required by statute be wanting. It is the settled policy of the law to require notice to be given to all the world of the title to and encumbrances upon real estate, to the end that an innocent purchaser, having no notice of liens or adverse claims not disclosed by the records in the manner prescribed by the statute, will hold land as against such claims and liens. Judgments and liens, in order to bind land as against persons having no actual notice thereof, must appear of record in the manner prescribed by the law; that is, they must be found in the records wherein the statute requires them to be entered. It is plain that a judgment, though formally entered and signed upon a paper duly filed and attached to the court files, would not operate as a lien, for the reason that it is not found in the books provided by law as the receptacle of the records of judgments. The statute requires indexes to be kept, and judgments and liens to be duly entered therein. Code, sec. 197. A transcript of a judgment filed in the clerk's office by special provisions is required to be indexed. Code, sec. 2885. The statute requires an index to be kept, and to be used by entering therein all liens. A judgment transcript or other lien is not completed as an encumbrance until it be indexed. The purpose of the index is to give notice of the encumbrance, just as the registry of a deed is intended to give notice of the conveyance. Now, it is plain that, in order to establish a

lien as against an innocent purchaser, having no notice thereof, the index, being the very instrument intended to impart notice, is to be regarded a part of the very record of the judgment; that is, the entry of the judgment in the book provided therefor, and the index required to be kept by the statute, constitute the record of the judgment as regarded when questions as to liens arise which affect purchasers without actual notice. Therefore, when a judgment is not indexed, a purchaser without actual notice is not bound thereby, for the reason that the record required by the statute to impart constructive notice, *i. e.*, the indexed judgment, does not exist. In support of these views, see *Thomas v. Desney*, 57 Iowa, 58; *Sterling Manuf. Co. v. Early*, 69 Iowa, 94; *Cummings v. Long*, 16 Iowa, 41; *Howe v. Thayer*, 49 Iowa, 154.

VII. Counsel for defendants insist that, as the statute declares that a judgment and a transcript shall be a lien from the day of the rendition of the one and the filing of the other, the lien is to be enforced without regard to the absence of the index required by law. They rely upon the following sections of the Code: "Sec. 2883. When the lands lie in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition. Sec. 2884. If the lands lie in any other county, the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies. Sec. 2885. Such clerk shall, on the filing of a transcript of the judgment in his office, immediately proceed to docket and index the same, in the same manner as though rendered in the court of his own county."

The last section quoted requires the transcript to be indexed. Other provisions, referred to above, require judgments to be indexed. These provisions and the sections just quoted are to be considered together in the light of the views we have above stated. The judgment or transcript before it becomes a lien must be of record, *i. e.*, entered in the record books required by statute. When that is done, it becomes a lien; before,

it was not, for the record was not completed by an entry in the index, which is required to make it a lien. This view harmonizes the provisions of the sections just quoted and other provisions hereinbefore referred to.

VIII. But we think a fair construction of the language of sections 2883-2885 does not authorize the conclusion that the lien begins upon the entry of a judgment or the filing of a transcript. Section 2883 declares that a judgment is a lien upon lands in the county wherein it is rendered, "from the date of such rendition." "Rendition" is the act of rendering. To "render" is "to make up; to finish; to state; to deliver; * * * as, to render a judgment." *Webst. Dict.* Now, a judgment is not rendered, so as to be effective and capable of enforcement as a lien, until it is "made up, finished, stated or delivered" in the form and manner as required by statute. It must be entered of record in the books prescribed by statute. One of these books is the "index of all liens." Therefore "the date of rendition" of the judgment which shall operate as a lien is when it is completely rendered, *i. e.*, entered on the record books prescribed therefor, among which is the "index of all liens." So the filing of a transcript of a judgment contemplated by section 2885 is not completed so as to make the judgment a lien until it be indexed. The judgment will not be regarded as rendered until it has been indexed.

IX. We reach the conclusion that, as the judgment set up by defendant was not entered in the "index of all liens," it is not a lien superior to plaintiff's mortgage. The decree of the district court will be reversed, and a decree foreclosing plaintiff's mortgage, in conformity with the views above expressed, will be entered in this court, or, at plaintiff's option, the cause will be remanded for such a decree in the court below.

REVERSED.

77 368
85 298

MEYER, STRAUSS, GOODMAN & Co. v. THE FARMERS &
TRADERS' BANK *et al.*

Trust: ASSIGNMENT TO SECURE TRUSTEE AND OTHERS: DUTY OF TRUSTEE. N. was indebted to the defendant bank, and to plaintiffs, and to C., S. & Co., and he assigned a policy of insurance, on which loss had occurred, to the bank, authorizing it to collect the policy and apply the proceeds, first in payment of his debt to it and expenses of collection, and to hold the balance subject to his order. He afterwards gave C., S. & Co. an order on the bank for what he owed them, which order was accepted, and then gave plaintiffs a like order for their claim, which the bank also accepted, subject, however, to be paid after the bank's claim and that of C., S. & Co. were satisfied. *Held* that the bank owed to plaintiffs no more than ordinary diligence in collecting the policy, and that it was justified in settling an action on the policy for less than half the amount thereof, and less than N.'s debt to it, thereby leaving nothing to pay plaintiff's claim, where the probability was that the action, if prosecuted, would be defeated, and that plaintiffs especially could not complain, since they were informed of the impending settlement, and made no proposition to prosecute the suit.

Appeal from Decatur District Court.—HON. R. C.
HENRY, Judge.

FILED, MAY 14, 1889.

ACTION in chancery to charge defendant, the Farmers and Traders' Bank, as trustee, and for damages, and an accounting on account of breach of trust duties, and for general relief. The Home Insurance Company is sought to be charged on a policy which had been discharged in the settlement of certain actions thereon. Upon a trial on the merits, plaintiffs' petition was dismissed. They now appeal to this court.

Phillips & Day, for appellants.

Cole, McVey & Clark, and *Parrish & Hoffman*, for appellees.

BECK, J.—I. The following are the facts of the case, as found by us upon the pleadings and evidence: (1) The Home Insurance Company issued to one Nott a policy of insurance upon a stock of merchandise in the sum of seven thousand dollars. Soon after, the merchandise was totally destroyed by fire. (2) Nott at the time owed the Farmers & Traders' Bank \$2,273; the plaintiffs, \$3,657; and another firm, Clement, Sayer & Co., five hundred and seventy dollars; and probably others in various sums. (3) Immediately after the fire Nott assigned the policy to the bank, giving it absolute power to collect the amount due thereon, and apply the sum, first, in payment of its claim and expenses of collection, and hold the balance to be paid to Nott, or subject to his order. (4) Nott gave an order upon the bank for five hundred and seventy dollars to Clement, Sayer & Co., to whom he was indebted in that sum, and afterwards gave an order for the amount they owed plaintiffs. These orders were accepted by the bank, the last subject to and to be paid after the claims of the bank and Clement, Sayer & Co. should be paid. (5) Nott commenced a suit on the policy in the district court of Decatur county, which was transferred to the United States circuit court, and the bank afterwards commenced a suit on the policy in the same United States court. Before the suit last named was commenced the plaintiffs notified the bank of the non-payment of the claim, and that they looked to it for protection in regard thereto, and that they would look to it for any loss resulting from its failure to prosecute a suit on the policy, or to otherwise act for the protection of plaintiffs' interest. (6) The plaintiffs contributed to the expense of maintaining the action by the bank against the insurance company, and otherwise assisted therein. (7) Negotiations of compromise were had between the parties, and the bank proposed to plaintiffs that it would settle its suit at fifty cents on the dollar, or that, if the actions against the insurance company should be settled at sixty cents on the dollar, it would consent thereto,

Meyer, S., G. & Co. v. Farmers & Traders' Bank.

provided it should receive ten cents on the dollar more on its claim than the plaintiffs should receive. (8) The insurance company offered to pay thirty-five hundred dollars, which the bank refused to accept, but afterwards it did accept in settlement twenty-one hundred and forty dollars, being less than the amount of their claim, and dismissed the action against the insurance company. Nott also dismissed his case against the insurance company. The policy of insurance was surrendered to the company.

II. The plaintiffs in this action seek to recover of both the bank and the insurance company the amount of their claim, on the ground that the settlement and dismissal of the cases were fraudulently made, and, as we understand plaintiffs' claim, upon the further ground, as against the bank, that it held the assignment of the policy from Nott in trust for plaintiffs, and it had no authority as such to make the settlement, which was in fraud of plaintiffs' rights.

III. We will proceed to the consideration of the questions arising in the case. The assignment of the policy recites that it is made in consideration of Nott's indebtedness to the bank, which is stated, and it authorizes the bank to collect the policy, and, after paying the indebtedness to the bank and costs, and expenses of collection, to pay the balance to Nott or to his order. Nott's order given to plaintiffs is conditioned for the payment of the bank and the sum due Clement, Sayer & Co. This order was accepted, on the condition that, after the payment of Nott's debts to the bank and Clement, Sayer & Co., it should be paid out of any sum remaining in the hands of the bank from funds collected by it from the insurance company upon the policy.

IV. The character and effect of this acceptance must be briefly considered. It was a conditional acceptance to pay out of a particular fund. It contains no contract with plaintiffs other than this conditional acceptance. The bank does not undertake to discharge any duty to protect plaintiffs' rights, and is therefore

Meyer, S., G. & Co. v. Farmers & Traders' Bank.

bound only to discharge the duties imposed by law. Neither does it surrender any rights or priority which it holds under the assignment. The bank was bound to exercise reasonable diligence to collect the full amount of the policy. But if in the exercise of prudence, good faith, and a reasonable degree of intelligence and diligence, it failed to collect a sum in excess of the amount due it, and settled the claim for the amount due it, and no more, it would not be liable to plaintiffs. The assignment was made primarily for the security of the bank, and it was authorized to enforce this security if it did so honestly, and in the exercise of ordinary diligence and intelligence. It could not by fraud or stupidity sacrifice plaintiffs' interests without becoming bound to make good their loss. It matters not whether we call the bank a trustee or the holder of the policy as security, having itself priority therein. Its rights and obligations do not depend upon the name we give it. It cannot be claimed that the bank, under the acceptance, became a trustee, charged with fiduciary relations, imposing upon it an obligation to exercise more than ordinary diligence, care and intelligence. If a trustee at all, it was not deprived of its rights of priority, and its right to enforce the security, to the end that its own claim would be paid without prejudicing the rights of plaintiffs by acts done in the absence of good faith and due care. Counsel for plaintiffs take no position and cite no authority in conflict with these views.

V. We think the evidence shows that defendant, in good faith, and in the exercise of due care, made the settlement and dismissed its case. It is shown that the case against the insurance company was a case that wisdom on the part of the claimants declared should be settled. While the company offered at first a settlement better for the insured than was afterwards made, it was made plain that the company had discovered defenses which would forbid a prudent man to attempt to overcome them, and that the amount realized by the settlement was as much or more than the bank or any other party could have recovered by prosecuting the

Meyer, S., G. & Co. v. Farmers & Traders' Bank.

suit. Indeed, the probabilities were that the suit would be defeated. The plaintiffs were informed that defendant intended to make a settlement. Plaintiffs made no move or proposition to prosecute the suit. We are quite clear that the bank is chargeable with neither bad faith nor want of intelligence and care in making the settlement.

VI. There is an effort to show that Nott was induced by improper influences to withdraw a motion he had made to set aside the settlement in his case. The evidence fails to establish the charge, either as to the bank or the insurance company. Surely, the insurance company had a right to pay Nott money to withdraw his opposition to the settlement. But the evidence fails to establish such facts. Nor does it authorize the conclusion that the bank is chargeable with such act, or any fraud connected with the settlement. The foregoing discussion disposes of all questions in the case necessary to be determined. In our opinion, the decree of the district court ought to be

AFFIRMED.

THE FORT MADISON LUMBER COMPANY V. THE
BATAVIAN BANK *et al.*

1. **Appeal: REVERSAL: RESTITUTION OF PROPERTY TAKEN UNDER JUDGMENT.** W. was the owner of stock in the plaintiff company, which he assigned as collateral security to the defendant bank, but which was afterwards claimed by the attaching creditors of W. The stock was not transferred to the bank on the company's books. The district court held that the bank had the superior right to the stock, and ordered it to be sold by the receiver in the case. It was sold accordingly to one, Bentley, but he was the bank's cashier, and the evidence (see opinion) shows that he acted as mere agent for the bank, which was the real purchaser. Bentley paid the purchase price to the receiver, and new shares of stock were issued to the bank. Upon an appeal to this court from the judgment of the district court, it was reversed on the ground that the attaching creditors of W. had the superior lien on the stock. By this time the stock had become worthless, if, indeed, it was not so at the time of the receiver's sale. Upon further proceedings on *procedendo*, held that the appellants were entitled to a surrender by the bank of all the stock which it received at the sale, but not to the payment by the bank of the amount bid for such stock.
2. ———: ———: **MISTAKE IN DECREE.** A mere mistake in the numerals used in the decree appealed from in designating the number of shares of stock to be sold, where the decree otherwise indicated the shares in question, is no ground for reversal, as the record below can be corrected at any time.

Appeal from Lee District Court.—HON. S. M. CASEY,
Judge.

FILED, MAY 14, 1889.

THIS is a controversy between the parties as to the proper decree to be entered in an action which was formerly tried in the district court upon its merits, but appealed to this court, where it was reversed, and remanded for further proceedings. A decree was entered to which the defendants, the Clark County Bank, Neillsville Bank, and Hammell & Co. excepted, and from which they appeal.

S. M. Casey, R. F. Kountz and M. C. Ring, for appellants.

W. J. Knight, C. W. Bunn and F. O' Donnell, for appellee.

Frank Hagerman, for plaintiff.

ROTHROCK, J.—I. The opinion of this court upon the merits of the original controversy will be found in 71 Iowa, 270. It appears from the opinion in that case, and from the record made in this appeal, that one Weston was the owner of stock in the Fort Madison Lumber Company. In 1883 he borrowed a large amount of money of the Batavian Bank, of La Crosse, Wisconsin, and assigned to it certain certificates of stock in said company as collateral security; but no transfer of the stock was made on the books of the company. Afterwards he became insolvent. D. Hammell & Co., the Clark County Bank, and the Neillsville Bank, creditors of Weston, commenced actions against him, and attached the stock in question. There being a controversy between the parties as to whether the Batavian Bank, as pledgee, or the attaching creditors, had the prior right to subject the stock to the payment of their claims, the plaintiff brought an action for the purpose of procuring a determination of that question. The court held that the attachments were subject to the rights of the Batavian Bank. This court reversed the cause, and held that the rights of the bank were subject to the attachments, and the cause was remanded for a decree accordingly. When the suit was originally determined in the court below, a receiver was appointed, who took possession of the stock, and an order was made that the receiver should sell the same, and a public sale was had, at which the stock was sold for some seven thousand dollars. There is a dispute between the parties as to the real purchaser at that sale. Appellants contend that the purchaser was one Bentley, and appellees insist that Bentley, who was cashier of

1. APPEAL:
reversal:
restitution of
property
taken under
judgment.

Ft. Madison Lumber Co. v. The Batavian Bank.

the Batavian Bank, purchased it for said bank. There is no dispute, however, that new certificates of stock were issued to the bank by the lumber company in lieu of the certificates which were sold. The order of court providing for the sale required that new certificates should issue to the purchaser of the stock which was pledged and attached. When the cause was remanded for a decree, the attaching creditors insisted that it was their right to have the amount at which the stock was sold paid into court for their benefit. The Batavian Bank contended that the decree should provide for the sale of the stock issued to it, and offered to deliver up the stock for the purpose. The court took this latter view of the rights of the parties, and entered a decree accordingly. It is claimed in behalf of appellants that the evidence taken in the proceedings to settle the decree shows that the Batavian Bank did not purchase the stock at the receiver's sale, but that the purchase was made by Bentley; that he paid the receiver in cash for it, and that the money was paid over to the bank. If this be true, the bank should not be allowed to hold the money. But, notwithstanding the bid appears to have been made by Bentley in person, and he signed a receipt to the receiver for the money as cashier of the bank, yet, taking all the circumstances and the situation of the parties into consideration, we think the finding that the purchase was really made for the bank should be sustained. Bentley was the cashier of the bank. It was located at La Crosse, Wisconsin, and he attended the sale at Fort Madison, in this state, on the tenth day of May, 1886. On the next day he signed the receipt at Fort Madison to the receiver for and in behalf of the bank. He was at the sale, presumably, as agent for the bank. He surely acted in that capacity when he receipted for the proceeds of the sale, and his relation to the bank precluded him from making the purchase on his own account, and if his purchase was for himself, he would have made some transfer of the purchase to the bank. There is no evidence that he had either the time or opportunity to do so, and the substituted stock was

Ft. Madison Lumber Co. v. The Batavian Bank.

issued to the bank, and the original decree provided that new stock should be issued to the purchaser.

II. The next question presented is the right of the bank to restore the stock to be sold or otherwise disposed of for the benefit of the attaching
THE SAME. creditors. Section 3198 of the Code is as

follows: "If by the decision of the supreme court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property or the value thereof." We think that under this provision of the law the district court properly held that it was the right of the Batavian Bank to surrender all that it received by the sale. The argument that the stock in question was not property taken from the attaching creditors by means of the judgment, and that the statute above cited has therefore no application, we do not think is sound. Weston was notoriously insolvent, and these parties as creditors were in litigation over the stock in question, each with claims largely in excess of its value and the decision of the court practically awarded it to one party or the other, and it seems to us it would be grossly unjust to require the Batavian Bank to pay some seven thousand dollars for stock which is now conceded to be practically worthless. As in some degree sustaining these views, see *Munson v. Plummer*, 58 Iowa, 736. If the Batavian Bank had done any act which depreciated the value of the stock there might be some reason for holding that it should pay the amount of the bid. But the only complaint made of the bank is that it would not loan money to the lumber company to enable it to carry on its business. That there was good reason for this refusal is apparent from the fact that none of the resident stockholders were willing to advance or loan money for that purpose. The fact is, the company was insolvent, and we believe from the evidence that its stock was practically worthless at the time of the receiver's sale.

Singer & Co. v. Armstrong.

III. The appellants contend that the decree should be reversed upon the ground that a mistake was made in the decree appealed from, in the numbers of the certificates ordered to be sold. 'This is no ground for reversal. The decree is for the sale of the new certificates issued in pursuance of the receiver's sale. If there is a mistake in the numerals by which the certificates are designated, no prejudice will result to appellants. The record can be corrected at any time.

AFFIRMED.

SINGER & CO. V. ARMSTRONG (AND SCHAUPP, Intervenor.)

1. **Assignment for Benefit of Creditors: ACCEPTANCE OF TRUST AND DELIVERY OF DEED.** Before the deed of assignment herein was executed, the person named as assignee had orally agreed with the assignor's brother to act as assignee in case an assignment should be made. The deed was afterwards made and placed in the hands of K., whom the assignor and his brother had requested to act for the assignee, who was absent. K. filed the deed for record, and afterwards an attachment was levied on the property. *Held* that the deed was delivered and the trust accepted prior to the attachment. (Compare *American v. Frank*, 62 Iowa, 202.)
2. ———: **VALIDITY: EVIDENCE.** Where the claim was made that an assignment for the benefit of creditors was void because certain property was withheld from the assignment, evidence tending to show that such property did not belong to the assignor was properly admitted.
3. ———: **EVIDENCE.** The acceptance of an assignment having been shown by oral testimony, the assignment itself was admissible in evidence.

Appeal from Hamilton District Court.—HON. S. M. WEAVER, Judge.

FILED, MAY 14, 1889.

THIS is an action at law to recover six hundred and forty dollars, aided by an attachment levied upon the

Singer & Co. v. Armstrong.

defendant's property at 10:15 o'clock p. m., July 20, 1887. Intervenor claims the property by virtue of an alleged general assignment to him as assignee for the benefit of the defendant's creditors, filed for record at 5:50 o'clock p. m., on the same day. The case was submitted to the court without a jury. The court found for the intervenor, and entered judgment accordingly, to which the plaintiff excepts, and from which he appeals. The facts appear in the opinion.

Martin & Wambach, for appellant.

Kamrar & Boeye, for appellee.

GIVEN, C. J.—I. The first question presented in the record is whether the assignment had been so accepted that it took effect before the levying of the attachment. The testimony shows that before the execution of the assignment at Webster City the defendant telephoned his brother, L. E. Armstrong, at Fort Dodge, to come to Webster City; that, before leaving Fort Dodge, L. E. Armstrong saw the intervenor, and informed him that defendant anticipated trouble, and might have to appoint an assignee, and asked him if he would act if he was appointed, to which intervenor replied that he would, and to go ahead and do what was necessary and call on him when wanted; that witness so informed his brother, after arriving at Webster City, and the assignment was executed and delivered to Mr. Kamrar, to be filed, and was filed for record, the defendant and his brother having asked Kamrar to act for Schaupp. On the next day—July 21—intervenor accepted the assignment in writing. These facts bring the case within the rule announced in *American v. Frank*, 62 Iowa, 202. There was no error, therefore, in overruling the plaintiff's motion to strike from the petition of intervention the allegations that intervenor had consented to accept said trust orally, nor in admitting evidence offered to show such acceptance.

1. ASSIGNMENT
for benefit of
creditors: ac-
ceptance of
trust and de-
livery of deed.

Reed v. Larrison.

II. The court admitted in evidence, over plaintiff's objection, certain written contracts between L. C. and A. J. Armstrong for the sale of goods on commission, and evidence in relation to the merchandise so held, and as to the ownership of two certain certificates of deposit. The plaintiff claims that the assignment is void because the assignor withheld from the assignment said certificates of deposit. The certificates of deposit were not included in the assignment, but were claimed to be the property of L. E. Armstrong. There was no error in admitting this testimony as it went directly to the ownership of the property claimed to have been withheld from the assignment.

III. The evidence of the oral acceptance of the assignment being admissible, there was no error in admitting the assignment itself in evidence.

IV. The assignment coming within the rule announced in *Americam v. Frank, supra*, and the testimony objected to having been properly admitted, we think the state of the testimony was such that this court should not reverse the conclusions of the trial court in finding the intervenor entitled to the attached property, and in rendering judgment therefor.

AFFIRMED.

REED V. LARRISON.

1. **Appeal: TRIAL DE NOVO: RECORD: EVIDENCE.** In order that an equity case may be tried *de novo* in this court, the abstract must show that it contains all the evidence offered and rejected below, as well as that introduced and received. Neither can a trial *de novo* be had when counsel for appellant, in their printed argument, admit that certain portions of the record which they regard as immaterial were omitted from the abstract. It is for this court alone, in such cases, to determine the admissibility of evidence offered, and the materiality of any portion of the record, and not for the court below in the one case, nor for counsel for appellant in the other.

77	399
86	77
77	399
102	746
103	486
77	399
104	250

Reed v. Larrison.

3. **Appeal: EQUITY CASE: TRIAL AS LAW CASE.** An equity cause cannot be reviewed as a law case in this court when no errors have been assigned.

Appeal from Calhoun District Court.—HON. J. P. CONNER, Judge.

FILED, MAY 14, 1889.

ACTION to quiet the title of certain town lots, which plaintiff alleges are her homestead, as against the claim of defendant under a sale on execution. A decree granting the relief prayed for by plaintiff was entered in the court below. Defendant appeals.

W. N. Treichler and W. P. Wolf, for appellant.

M. R. McCrary and H. E. Long, for appellee.

BECK, J.—I. The original abstract of appellant alleges that it “contains all the evidence introduced and received on the trial” of the case. An amended abstract, filed also by appellant, alleges that “the original abstract of record filed by appellant heretofore contains all the evidence upon which the case was tried.” Counsel for appellant admit in their printed argument that “in preparing the abstract of record we omitted such formal parts as did not appear to us material, and that which we did not call into account.”

II. It clearly appears that we have not before us all the evidence upon which the case possibly should be tried *de novo* in this court. We should have an abstract of all the evidence offered in the court below. That court cannot determine for us what evidence is competent and admissible in the case when it is tried here *de novo*. It will not do to bring a case here for trial *de novo* upon the evidence offered and received in the court below, and upon which it was there tried. The evidence offered and rejected must be sent to this court, and presented in the abstract. It also appears that the abstract does not present all of the records. Portions

 Winelander & Co. v. Jones.

thereof which counsel for defendant thought were not material are not set out in the abstract. This court, and not counsel, is charged with the duty of determining the materiality of the records to be considered in deciding a case. Under familiar rules prevailing in this court, applicable to the condition of the record before us, we cannot try the case anew as a chancery case ought to be tried. It cannot be tried as a law case for the reason, if no other exists, that no errors have been assigned. We are required, in view of the condition of the record, to order the decree of the court below

AFFIRMED.

WINELANDER & CO. V. JONES.

77	401
79	486
77	401
89	510
77	401
119	845

1. **Appeal: LESS THAN \$100: CERTIFICATE OF TRIAL JUDGE: SUFFICIENCY.** In this appeal, involving less than one hundred dollars, the certificate of the trial judge recited the ultimate facts which the evidence established, and upon which the certified questions of law depend, and did not require this court to determine the effect of the evidence. *Held* that it was sufficient to give this court jurisdiction, as against the objection that it showed that there was a conflict in the evidence, and was a certificate of the conclusions of the court as to the facts found. (See opinion for certificate.)
2. **Sale: ACCEPTANCE OF GOODS: FACTS CONSTITUTING: PRESUMPTION.** Where a person purchases goods of a certain description for future delivery, and upon receiving them discovers a defect, and informs the vendor thereof, who satisfactorily rectifies it, the vendee will thereupon be regarded *prima facie* as fully accepting the goods; and before he will be permitted to return the goods upon the discovery of other defects, he will be required to rebut the presumption of a full acceptance upon the curing of the first defect. In other words, a purchaser will not be permitted to make separate demands, founded upon partial inspections of the goods, in the absence of a sufficient excuse therefor.

Appeal from Keokuk Superior Court.—HON. HENRY
BANK, JR., Judge.

FILED, MAY 14, 1889.

VOL. 77—26

THIS is an action to recover the price of a bill of umbrellas sold by plaintiffs to defendant. The cause was tried to the court, and judgment rendered in favor of defendant. The plaintiffs appeal.

W. J. Roberts, for appellants.

W. B. Collins, for appellee.

ROBINSON, J.—The amount in controversy not exceeding one hundred dollars, the trial judge certified to this court questions for its determination, in language as follows: “I the undersigned, judge of the court aforesaid, do hereby certify that the determination of this cause involves a question of law upon which it is desirable to have the opinion of the supreme court. The question is: In January, 1887, defendant ordered by sample a bill of fourteen umbrellas from plaintiffs, which were to be billed of date April 1, 1887, to be paid for four months thereafter, with right of discount if paid before. Defendant received the umbrellas from the carrier on February 17, 1887; opened the package containing them; discovered they were enclosed separately in paper covers, when he claimed they should have been enclosed in cloth covers. He notified plaintiffs of this fact, and was furnished with the kind of covers desired. Making no further inspection of the umbrellas at this time, defendant put same away until there should be a demand therefor; there being no sale for such goods until about April 1. Subsequently he sold three of the lot at various times, without inspection of the goods sent to him. On April 5 or 6, 1887, having occasion to make a further sale, defendant, on opening one of the umbrellas, discovered same was defective, in that the silk did not correspond with the sample shown at the time the order was made; that they were not the goods ordered, in that the silk was not of the quality of the goods ordered. On April 6, 1887, he shipped the remaining nine umbrellas to plaintiffs, and notified them that he had done so because he claimed same did not

correspond with the sample and the goods ordered, and because they were not of the quality of the goods ordered, and were not the goods ordered, and worthless. Plaintiffs refused to accept the returned umbrellas. (1) Had there been such an acceptance of the umbrellas by defendant that he had waived his right to return same? and (2) had defendant had a reasonable opportunity to inspect the umbrellas prior to April 5 or 6, 1887?"

I. The first question we are required to determine is the sufficiency of the certificate to give this court jurisdiction of the cause. It is insisted by
 1. **APPEAL: less than \$100: certificate of trial judge: sufficiency.** appellee that the certificate is not sufficient, because it shows that there was a conflict in the evidence, and is a certificate of the conclusion of the court as to the facts found. The position of appellee would be well taken if the certificate required us to examine and determine the effect of the evidence. *Chilton v. Railway Co.*, 72 Iowa, 690; *Riddle v. Fletcher*, 72 Iowa, 455; *Hudson v. Railway Co.*, 59 Iowa, 582. But it does not require that at our hands. It recites the ultimate facts which the evidence established, and upon which the questions certified depend. The accuracy and completeness of the statement of facts is not questioned. Ordinarily, where the facts are admitted, their effect is a matter of law, to be determined by the court. *McLaury v. City of McGregor*, 54 Iowa, 718; *Hirshhorn v. Stewart*, 49 Iowa, 418; *Clafin v. Lenheim*, 66 N. Y. 305; *Hedges v. Railway Co.*, 49 N. Y. 224. It has been held, in a case involving the acceptance of goods sold, that "when the uncontroverted facts are such as cannot afford any ground for finding an acceptance, or where, though the court might admit that there was a *scintilla* of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence, it is the duty of the court to withhold the case from the jury." *Stone v. Browning*, 68 N. Y. 604; *Shepherd v. Pressey*, 32 N. H. 56. The general rule is subject to modification in some cases, as where

different minds might reasonably reach different conclusions, from the facts admitted. *Whitsett v. Railway Co.*, 67 Iowa, 159. We are of the opinion that the facts shown by the certificate are of such a character as to indicate their proper legal effect with reasonable certainty, and conclude that the certificate is sufficient to give this court jurisdiction of the case. Questions of law alone are presented for our determination.

II. Defendant received the package containing the umbrellas and opened it on the seventeenth day of February, 1887. He then examined the umbrellas sufficiently to know that they were not encased in cloth covers. The alleged defect was of such a nature as to be readily ascertainable. Use of the umbrellas was not required to disclose it. No fact justifying the course of defendant in not making such an inspection as would have disclosed defects which could have been readily discovered is shown. It appears that he did in fact make a partial inspection, and found an alleged defect, which was remedied by plaintiffs on application. We do not think defendant should be permitted to make separate demands, founded upon partial inspections of the goods, in the absence of a sufficient excuse therefor. His first inspection of the goods, his demand for the cloth covers, and his acceptance of them, when sent, established *prima facie* a full acceptance, and it was incumbent on him to excuse his failure to discover and object to the defect of which he now complains when he made his first demand, in order to rebut the presumption of an absolute acceptance. But the certificate discloses no fact which even tends to excuse his failure. On the contrary, he kept the goods for several weeks, and until he had sold or otherwise disposed of more than one-third of them. In our opinion the unexplained delay was unreasonable. Both of the questions certified should be answered in the affirmative.

REVERSED.

**NELSON V. THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.**

77	405
92	540
77	405
111	291

1. **Railroads : INJURY TO EMPLOYE : NEGLIGENCE : EVIDENCE.** Plaintiff sues for injuries received by being struck with the crank of a windlass used in connection with a ditching machine. The negligence charged consisted in a co-employee's releasing the brake without warning to plaintiff. It is apparent that if he had been so warned he would not have been injured. There was evidence tending to show due care on plaintiff's part, and negligence on the part of the co-employee, so that a verdict for plaintiff cannot be set aside in this court.
2. **Deposition : USE OF BY AGREEMENT.** Prior to the first trial in this case the parties entered into a written agreement that the deposition of plaintiff, already taken, might be used in evidence on the trial of the cause. But plaintiff was present and testified in person at that trial. At the second trial, however, plaintiff was absent, and the court, against defendant's objection, admitted the deposition. *Held* that this was justified by the agreement.
3. **Appeal : REVIEWING ARGUMENT TO JURY.** Complaint is made to this court of the argument of plaintiff's counsel to the jury, and the argument is printed at length in the abstract; but in the absence of a showing in the abstract that it was preserved by a bill of exceptions, or in some other way recognized by the statute and the practice of the courts, this court cannot consider the complaint.

Appeal from Scott District Court.—HON. ANDREW HOWAT, Judge.

FILED, MAY 14, 1889.

ACTION by a railroad employe to recover for personal injuries sustained through the negligence of a co-employe while engaged in operating a ditching machine used in connection with an engine and cars upon defendant's railroad. There was a judgment on a verdict for plaintiff. Defendant appeals. The case has been before in this court. See 73 Iowa, 576.

Wm. K. White and Grant & Grant, for appellant.

Heinz & Hirschl, for appellee.

BECK, J.—I. It was determined in the former appeal in this case that plaintiff, while working upon the ditching machine, was employed in connection with the use and operation of the railroad.

II. The evidence shows that plaintiff incurred the injury while he was working at the crank of a windlass

1. RAILROADS: used to raise and lower a bucket or shovel.
injury to
employee: The windlass was controlled by a brake in
negligence: charge of an employee. The injury to plain-
evidence. tiff resulted from being struck by the handle of the
windlass, which broke his shoulder. The negligence
charged consisted in the employee's releasing the brake
without warning or notice to plaintiff. Counsel for
defendant insist that the evidence fails to show negli-
gence on the part of any co-employee, and that plaintiff
fails to show that he was in the exercise of due care.
We think there is evidence upon both of these points
tending to support the verdict. Plaintiff testifies, in
effect, that he was not informed that the brake was to
be taken off, so that the bucket would drop as it did.
He is corroborated as to this point. It is quite appar-
ent that, had he been warned, he would have escaped
the injury. Upon these facts and others the jury could
well have found negligence on the part of plaintiff's
co-employee, and that he was in the exercise of due care.

III. Before the first trial in the case, the deposition
of plaintiff had been taken in his own behalf. The parties

2. DEPOSITION: entered into a written agreement to the
use of by effect that the deposition "may be used in
agreement. evidence on the trial of the cause," subject
to objections noted therein. The plaintiff being present
at the first trial, the deposition was not read. He testi-
fied orally. After the reversal of the case, the cause
was again brought to trial, and, plaintiff not being
present, the deposition was permitted to be read, against

Nelson v. The Chicago, M. & St. P. Ry. Co.

defendant's objection. We think the court below correctly ruled on this point. The written agreement is not limited in time as to its stipulation for the reading of the deposition. It had not been read. It was agreed that it should be. The agreement does not prescribe when it shall be read, except that it "may be used in evidence on the trial of the cause." Now, we cannot interpolate words into this contract which will restrict its use to the first trial. It is agreed that it may be read. If counsel's views are correct, the agreement becomes inoperative, and is thus defeated, for it can never be used at all. We think the deposition was rightly admitted.

IV. Counsel for defendant complain of the argument made by plaintiff's counsel to the jury, and insist that it was in violation of the rules of the law applicable to the duty and privileges of counsel, and was prejudicial to defendant.

8. **APPEAL:** reviewing argument to jury.

The argument is printed at great length in the abstract. We are unable to declare that it so violates the rules of the law applicable to the matters as to require a reversal of the judgment in the case. But we cannot enter into a consideration of the argument for the reason that it is not shown by the abstract that it was preserved by a bill of exceptions, or in any other way recognized by the statute and the practice of the courts. It is only shown as a part of the motion for a new trial.

No other questions are discussed by counsel. In our opinion the judgment of the district court ought to be

AFFIRMED.

77	408
78	134

77	408
91	390

77	408
106	634

77	408
142	153

DUDLEY V. THE MINNESOTA AND NORTHWESTERN RAILWAY COMPANY.

1. **Railroads : RIGHT-OF-WAY DAMAGES : APPEAL : EVIDENCE.** Where defendant made application to the sheriff to appoint a jury to assess the damages which the owner of land would sustain by the appropriation of a right of way over certain government subdivisions, describing them, and the land-owner appealed from the award, and described the premises in his notice as they were described in the application, and the land so described was only a part of his farm, *held* that this did not preclude him from proving and recovering the damage to his whole farm from the appropriation of the right of way. (Compare cases cited in opinion.)
2. ——— : ——— : **INSTRUCTIONS.** Instructions to the effect that inconveniences in the use of a farm, and necessary danger from fire, resulting from the appropriation of a right of way for a railroad over the farm, are to be considered, in estimating the owner's damages, only as they bear upon the market value of the farm after the appropriation, are *held* to be correct. (*Lance v. Railway Co.*, 57 Iowa, 686, *distinguished*.)
3. ——— : ——— : **EVIDENCE : ASSESSED VALUE.** While an assessor might be a very competent witness as to the value of a farm before and after it was crossed by a railroad, the valuation put upon it by him as assessor for successive years is not competent evidence, and the assessment rolls cannot be used for that purpose.
4. ——— : ——— : **EXCESSIVE VERDICT.** A verdict of \$1,700 for damages to a farm of three hundred and eighteen acres, where some of the witnesses testified that the farm was damaged to the extent of ten dollars per acre, cannot be said to be excessive.

Appeal from Fayette District Court.—HON. L. O. HATCH, Judge.

FILED, MAY 14, 1889.

PROCEEDINGS for the assessment of damages for the establishment of defendant's right of way. From an assessment of damage by the jury in the district court the defendant appeals.

Dudley v. The Minnesota & N. W. Ry. Co.

Fouke & Lyon and *Lusk & Bunn*, for appellant.

Ainsworth & Hobson and *Hoyt & Hancock*, for appellee.

GRANGER, J.—The sheriff's jury, to assess the damage for the location of the right of way over plaintiff's land, was summoned at the instance of defendant. The application is for appraisers to assess the damages "for a one-hundred foot right of way in and over the following described tracts or parcels of land, * * * to-wit: The north half of the southeast quarter, and the southwest quarter of the northeast quarter. * * *" The application then directs the sheriff to "appoint six freeholders of the county," etc., "to assess the damage which the said Dudley will sustain by the appropriation of said right of way." The language in the notice of appeal is that he appeals "from the award and assessment of damages, * * * sustained by reason of the location and construction of the railroad over and across the following described real estate:" (then describing the same land as in the application.)

I. The land described is one hundred and twenty acres, and the plaintiff's farm consists of three hundred and eighteen acres; and on the trial the plaintiff was allowed to prove the damage to the entire farm, and the defendant assigns that as error, and insists that the inquiry should have been limited to the premises described in the notice of appeal. It is to be noticed that neither the application by defendant for the assessment, nor the notice of appeal by plaintiff, in any manner indicates that there is to be an assessment of damages only to the premises described; but in the application for an assessment the premises are described as those crossed by the right of way, and the damages are such as he will "sustain by the appropriation of the right of way." The premises from which the right of way is taken are described, and the damages legitimately resulting therefrom are to be assessed. It is

1. RAILROADS:
right-of-way
damages:
appeal:
evidence.

from such an assessment that the plaintiff appealed to the district court.

The case is stronger against appellants than *Cox v. Railway Co.*, 76 Iowa, 306. It is unnecessary to refer to the many authorities bearing upon the right of assessment in such cases, as the plaintiff, by his application, has asked for all damages legally resulting from the appropriations; and, when a farm is crossed on a right of way, that the damage to the entire farm may be considered in estimating damages is hardly an open question in this state. There is nothing in the case of *Ball v. Railway Co.*, 71 Iowa, 306, not in harmony with this holding. It is not held therein that all the land damaged must be described in the papers in such cases. In commenting on the testimony some language is used as to certain lands not being described in the papers. It is used evidently more with reference to the confused state of the record than otherwise, as it seems some of the land was not traceable to any definite location.

II. Complaint is made of the seventh instruction given by the court in these words: "You will notice that your inquiry is not confined to the
THE SAME. three forties actually crossed by the railroad, but you are required to ascertain from the evidence the damages which the plaintiff will sustain in consequence of this appropriation." It is in harmony with the rule herein announced as to the admission of testimony, and is correct.

III. The eleventh and twelfth instructions given by the court are claimed to be erroneous, and are as follows: "(11) So, in seeking the value of
2. —: —. Instructions. this farm immediately after the right of way was taken, you will consider not only the opinion of witnesses, but the facts upon which a just opinion ought to be based. You will consider not only the loss of the land actually taken, but the condition in which the farm was left after the appropriation, and every inconvenience naturally resulting from such appropriation by

which the market value of the farm was then unfavorably affected. I need not enumerate these inconveniences in detail. You are not to allow damages for these inconveniences as such, but you are to consider them for their bearing, and only for their bearing, on the market value of the farm to which such inconveniences are attached. To illustrate: If you find among these inconveniences the necessity of opening gates, and crossing the railroad often, in conducting the operations of the farm, you will not attempt to estimate the damages resulting from this inconvenience, and make this estimate a part of your assessment; but in estimating the fair value of the farm you will look at the farm with this inconvenience attached, and give it due weight in making this estimate. (12) You cannot assume that the owner of this farm will some time be injured by fire in consequence of defendant's negligence, and you cannot assess damages on this account; but if you believe the necessary danger from fire in operating the defendant's trains over this farm is a fact which would tend to depreciate the value of such farm, then this danger from fire may be considered with other things in seeking the value of this farm immediately after the appropriation. The same method of investigation will guide you in considering every inconvenience that can be properly considered by you."

It is urged that the eleventh instruction is in conflict with the rule laid down in *Lance v. Railway Co.*, 57 Iowa, 636. The comments of the court in that case, when carefully read, do not support the conclusion placed on them by appellant. It is not therein held that in so far as the location of the road would lessen the market value of the farm on account of danger from fire or other causes, it could not be considered. It is there stated that "the evidence as to continual danger from fires set out by the engines used in operating the road was incompetent, because mere matter of opinion," etc. The court says: "It was competent to show the situation of the grove and buildings, and the jury were as well qualified as the witnesses to determine

Dudley v. The Minnesota & N. W. Ry. Co.

the probable effect upon the property by the operation of the road." The idea in that case was that the testimony admitted would lead to improper results; but the spirit of the reasoning is in harmony with the instructions given in this case. We think the law, as stated in both instructions, correct, and very fairly given.

IV. The defendant offered to prove the assessed valuation of the lands for the years 1885 and 1886, and the testimony was excluded by the court, and appellant says this was error. The argument is that the assessor would certainly be a competent man to give an opinion on such values, and that the testimony as to value was based on opinion. It is true the assessor may have been a very competent man to give testimony as to the value of the farm, but the objection was not to him but to a written statement of his. If he had been offered as other witnesses who gave their opinions, and subject to cross-examination, we might have a different record. We know of no authority or reason for admitting the assessment roll as evidence of value between third parties.

V. It is urged that the verdict is excessive. The jury allowed seventeen hundred dollars damages to a farm of three hundred and eighteen acres. Quite a number of witnesses fix the value of the farm at ten dollars per acre less after the location of the road, which would fix the damage at three thousand, one hundred and eighty dollars. Considering all the testimony, we think the verdict of the jury very conservative, and free from prejudice. They were required to be governed by the testimony as they believed it.

VI. The court refused to the defendant a change of venue, but we see nothing in the record to show an abuse of discretion in that respect, and we should not interfere.

AFFIRMED.

McKAY v. WOODRUFF, Sheriff.

77	413
115	106

1. **Appeal : DISMISSAL : FAILURE TO FILE ABSTRACT.** An appeal will not be dismissed on account of the appellant's failure to file an abstract within the prescribed time, where it appears that the appeal was taken in good faith, and not for delay, and that the delay in prosecuting it was in part unavoidable and in part by consent. (See chap. 56, Laws of 1874.)
2. **Criminal Law : MITTIMUS DOES NOT EXPIRE TILL EXECUTED : SERVICE AFTER VOID RETURN.** Where the judgment is that defendant be fined, and be committed in default of payment of the fine, and the clerk makes and delivers to the sheriff a certified copy of the judgment, such copy has the force and effect of a warrant (see Code, sec. 4512), and thereunder the sheriff is required to arrest and commit the defendant ; and such warrant does not expire until executed, and if the sheriff returns it "Nothing made," or "Defendant not found in this state," such return is a nullity, not being authorized by law, and the sheriff may afterwards take up the warrant and arrest and commit the defendant thereunder.
3. **—: REMITTING FINES BY COMPROMISE : POWER OF DISTRICT ATTORNEY AND SUPERVISORS.** Neither the district attorney nor the board of supervisors has any power to remit fines directly, nor to do so indirectly by the satisfaction of the judgments therefor for a less sum than the fines imposed, even though such compromise may be desirable from a pecuniary point of view ; and such satisfaction is no bar to the arrest of defendant upon executions issued upon such judgments, even though the satisfaction is not set aside.
4. **—: PARTIAL AND CONDITIONAL PARDON : SUBSEQUENT ARREST OF DEFENDANT.** A commutation by the governor of a fine, so far as to release certain property from the lien thereof, but in no way affecting the defendant's personal liability therefor, and upon condition that he pay all costs, and refrain from the unlawful business for which he was convicted, is no bar to his subsequent arrest and commitment,—not, at least, until he shows that he has complied with the conditions of the commutation.

*Appeal from an order of HON. J. K. JOHNSON, Judge,
in a Habeas Corpus proceeding.*

FILED, MAY 14, 1889.

Bolton & McCoy, for appellant.

Haskell & Greer, for appellee.

GIVEN, C. J.—I. The order remanding appellant to custody was made May 25, 1887, and an appeal duly perfected on the same day. September 25, 1888, appellee filed his motion to dismiss the appeal and affirm the order appealed from, because of appellant's having failed to file an abstract of the record. Code, section 3182, as amended by chapter 56, Laws, 1874, provides "that no appeal to the supreme court of the state shall be dismissed, or judgment of court below affirmed, because the said cause was not docketed or transcript filed in supreme court, if it be made to appear that an appeal was taken in good faith, and not for delay, or if from the conduct of appellee or his counsel appellant was induced to believe no motion to dismiss or affirm would be made." It appears from appellant's showing in resistance to the motion that the appeal was taken in good faith, and not for delay, and that the delay in prosecuting it was in part unavoidable, and in part by consent. We think the motion to dismiss and affirm should be overruled.

II. Appellee, as sheriff of Mahaska county, detains appellant in the jail of said county by virtue of three *mittimi* issued on three separate judgments for fines and costs against appellant in the district court of said county. Appellant claims that his detention is illegal, (1) because the *mittimi*, upon which he is held, were issued, executed and returned to the clerk's office years before it was attempted to execute them by appellee's taking them again from the files of the clerk's office, and taking appellant into custody under them; and (2) because, when these several *mittimi* were executed by appellee's taking appellant into custody, the judgments had been satisfied of record. The record shows three judgments for costs, and three for fines and costs, in state cases, against appellant, aggregating \$560.30; the three for

1. APPEAL: dismissal: failure to file abstract.

2. CRIMINAL law: mittimus does not expire till executed: service after void return.

 McKay v. Woodruff.

fines and costs amounting to \$1,494.30. Certified copies of the judgment entries were issued in 1885 to the sheriff in each of the three cases wherein fines were assessed. Within a few months after their issue each was returned to the clerk, one return being, "Nothing made;" the others, "Defendant not found in this state." By referring to chapter 34, title 25, Code, it will be seen that the certified copies of these judgment entries had the force and effect and conferred the same authority as warrants,—that under them the sheriff was required to arrest and commit the appellant, and that no such returns as were made are required or authorized. No return is authorized until after commitment. It was the duty of the sheriff to hold these certified copies until executed by arrest and commitment, and, if that was not accomplished during his term of office, to turn them over for execution to his successor. Such warrants do not expire by lapse of time, nor by being returned to the clerk unexecuted.

III. It appears that, before the arrest complained of, entries were made upon the record of each of these judgments, showing them satisfied. These satisfactions were by J. A. Donnell, district attorney, "and in consideration of the sum of one hundred and seventy-five dollars in hand paid by Bolton & McCoy, attorneys for A. McKay, and by virtue of authority given by the board of supervisors of Mahaska county, Iowa." Section 16, article 4, Constitution of Iowa, and section 4712, Code, vest the power to grant reprieves, commutations and pardons, and to remit fines and forfeitures, solely in the governor of the state. Neither the district attorney nor board of supervisors has any authority to remit fines. The fact that the compromise made was desirable, because of a prior mortgage on appellant's real estate, did not confer authority on the district attorney or board of supervisors to remit any part of the fines. Such a fact might well be addressed to the executive.

8. —: remit-
 ting fines by
 compromise:
 power of dis-
 trict attorney
 and super-
 visors.

McKay v. Woodruff.

IV. It is claimed that, as these judgments were satisfied of record, appellant was not amenable to arrest until the satisfactions were set aside. The records show upon their face that the satisfactions were without authority; that they were absolutely void; hence they were no bar to further proceedings to enforce the judgments.

THE SAME.

V. O. M. Kohn held appellant's notes for about thirty-six hundred dollars, secured by mortgage on part of a certain lot, which mortgage was superior to the judgments under notice. On May 20, 1886, the governor granted a commutation to appellant in these words: "Now, therefore, I, William Larrabee, governor of the state of Iowa, do hereby commute said judgments, so far as to release said above described property from the liens occasioned by said judgments, but in no manner to relieve said A. McKay from his personal liability in the premises. This commutation is granted upon the condition that said McKay shall pay all costs assessed against him in said cases, and upon his giving a pledge to forever refrain from engaging in the saloon business in Iowa in violation of law." Clearly, this commutation was limited to the release of the property, and in no manner relieves appellant from his personal liability. If it did, it does not appear that McKay has complied with the condition upon which the commutation was granted. The order of Hon. J. K. JOHNSON, remanding appellant to the custody of appellee, sheriff, is

4. — : partial
and condi-
tional par-
don: subse-
quent arrest
of defendant.

AFFIRMED.

THE STATE V. BILLINGS.

1. **Criminal Law: GRAND JUROR: FREEDOM FROM BIAS: EXAMINATION.** One of the grand jurors who found an indictment for murder in the first degree against defendant was examined at length as to his freedom from bias, and the material part of his examination is set out in the opinion (which see), from which it appears that he had engaged in some talk of lynching the defendant; but *held* that the examination evidenced a state of mind reasonably free from any prejudice or conviction that should disqualify him, and that the court did not err in allowing him to sit on the case.
2. ———: ———: **NUMBER NECESSARY TO INDICT.** In a county where, under the present statute, the grand jury consists of five members, and a challenge is sustained as to one, and his place is not filled, the remaining four may, if they all concur, find a valid indictment. (*State v. Shelton*, 64 Iowa, 333, *followed in principle*.)
3. ———: **CHANGE OF VENUE: PREJUDICE OF JUDGE: DUTY OF COURT.** Where a change of the place of trial of a criminal case is sought on the alleged ground of the prejudice of the presiding judge, the judge is not at liberty to avoid the embarrassments of a trial in the face of such objections by granting a change, but must rule upon the application, when fully advised, "according to the very right of it" (Code, sec. 4374), and his ruling will not be disturbed on appeal unless it is shown that he has abused his discretion; and no such showing is made in this case.
4. ———: ———: **PREJUDICE OF PEOPLE: SHOWING AND COUNTER-SHOWING: ABUSE OF DISCRETION.** The application for a change of venue in this case, involving a charge of murder in the first degree, was supported by the affidavits of some forty or fifty persons, showing a high state of feeling among the people, and at least some prejudice against defendant, and that there was some talk of lynching him. It also appeared that many other persons applied to to make like affidavits would have done so but for prudential reasons. This showing was opposed by the affidavits of some eight hundred persons, which do not controvert the facts of excitement and prejudice, but do controvert the claim that the excitement and prejudice were so great as to prevent a fair and impartial trial. *Held* (all concurring) that to have granted the change upon the showing made would have been in accord with the general practice in such cases, and (GRANGER, J., *dissenting*) that it was, under all the circumstances, an abuse of discretion for the court to deny the change. (Compare *State v. Read*, 49 Iowa, 85, and *State v. Perigo*, 70 Iowa, 657.)

77	417
89	114
89	413
77	417
96	435
77	417
d130	481
77	417
f143	583

5. ——— : INSTRUCTIONS : CREDIBILITY OF DEFENDANT'S WIFE AS AFFECTED BY HIS CHARACTER AND MOTIVES. On the trial of defendant for the murder of one Kingsley, the court instructed the jury as follows : "Even though you may believe from the evidence before you that the defendant has been a man of base and degraded life, and that he was, from sordid motives of personal gain, pressing a false charge against Kingsley, or even that defendant and his wife had conspired together to extort money from him, or that the evidence shows that defendant was guilty of other crimes not charged in this indictment, none of such considerations will warrant you in convicting the defendant on this indictment; nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive toward the deceased." Defendant's wife was a very important witness in his behalf. *Held* that the instruction was erroneous, because, though it was designed to express the correct rule of law, and would be readily so understood by the professional mind, yet its language permitted the jury to consider the acts and misconduct of the defendant, in regard to which his wife had no part or connection, as affecting her credibility, on the single condition that "she participated in any improper motive towards the deceased."

Appeal from Bremer District Court.—HON. G. W. RUDDICK, Judge.

FILED, MAY 14, 1889.

THE defendant was indicted for murder of the first degree. Upon the trial of the indictment the defendant was convicted of murder of the second degree, and from a judgment on the verdict he appeals.

W. L. Eaton, C. Wellington and E. M. Billings,
for appellant.

John Y. Stone, Attorney General, and E. A. Dawson,
for the State.

GRANGER, J.—I. At the empaneling of the grand jury that returned the indictment, one Bockhouse was examined as to his qualifications, and error is assigned as to the rulings of the court in permitting him to remain as a member of the panel. The juror is of foreign birth, and it

1. CRIMINAL law:
grand juror:
freedom from
bias: exam-
ination.

The State v. Billings.

is evident he did not at all times fully understand the import of the questions, and in some cases, we think, his answers did not exactly express his purpose. He resided some seventeen or eighteen miles from Waverly, where the homicide occurred, and where the court was sitting. The material part of his examination is as follows: "*Counsel for Defendant. Question.* Mr. Bockhouse, isn't it a fact that you have said frequently, at your own town of Tripoli, that you believed Mr. Billings to be guilty of murder? *Answer.* I have said like this: If he done the shooting, of course he was guilty. *Q.* That is not an answer to my question. *A.* That is the only thing that I remember that I have said. *Q.* Isn't it a fact that you have said, and said frequently, in your own town, you believed Mr. Billings was guilty of murder? *A.* I don't know how to answer that. I don't know that. I couldn't said that he was. *Q.* Haven't you said that you believed he was? *A.* Why, I might have said so on the first, by the saying that some talked. I might have said that. I don't know, though. *Q.* Haven't you said besides, frequently, that in your opinion he ought to be hung? *A.* No; I don't think I have. Don't remember of as I have said that. Don't know as I have said any more than any man that murdered in such a way as that, I thought, ought to be hung. I think that is the way I have said it. Don't think I said that frequently. Never talked with people over there very much in regard to this matter. *Q.* Haven't you said that you would be glad to help hang him? Said it in your own town? *A.* No more than just what I say. If he was the man that shot Mr. Kingsley, that he ought to be hung. I don't know but I would help hang him if I was right there. Some such remark. *Q.* You have said you would help hang him if you were right there? *A.* Yes, sir; if he was in the wrong. *Q.* Haven't you said you believed he was in the wrong, and you would be glad to help hang him, or that in substance? *A.* I never said I would be glad to help hang him. Don't remember that I said I was going to help hang him. Don't think I ever said that.

The State v. Billings.

I won't swear to it; but don't think I ever said that. Don't think there has been much talk over at Tripoli about hanging him. I believe some talk in regard to lynching him. Think I heard such talk. Think I have talked with others. *Court.* In your talk with others there, did you say that you would participate in any attempt to lynch him? Did you say you would do anything of that kind? *A.* No; no, sir; no; I don't think I ever said any such thing. *Court.* Do you mean to say that you have formed no opinion upon the question of guilt or innocence of Mr. Billings on the charge of murder? *A.* I say that I have formed no opinion. *Q.* Do you mean to say that you have expressed no opinion upon that question? *A.* I haven't formed any opinion. *Court.* I ask you about your expression now. Have you expressed any opinion of that character? *A.* You mean whether I expressed my opinion whether he was guilty? *Court.* Yes, sir; guilty or innocent. *A.* I don't know that I have said that he was guilty; not that I remember. *Court.* You don't remember that you have made any such expression? *A.* I don't remember that I made any such expression that he was guilty. *Court.* Is your state of mind such that you could investigate the charge for which he is held here with entire candor and fairness? *A.* Well, it is so I want to hear a good deal more about it than I have before. *Court.* No; but would you investigate it fairly, candidly and impartially? Of, course, it is here for the purpose of investigation. *A.* I mean, before I could pass my opinion, I would want to hear a good deal more than I have. *Court.* I want to know whether or not you can take part in that investigation impartially, for the purpose of determining from the evidence the fact, free from any prejudice that you have had heretofore, if you ever had any. *A.* Yes, sir; free from any prejudice, I could take part.

It is true, the juror had been in the midst of strong excitement, and where there was evidently a conviction as to the guilt of the defendant, as must be the case where there is talk of lynching. One expression of the

The State v. Billings.

juror, as "Think I talked with others," in the connection in which it appears, tends to show that he talked with others of lynching. If satisfied of the fact that he counseled or favored such a proceeding, we should hesitate much before allowing an indictment found by the vote of such a grand juror to stand. From all the testimony of the grand juror, we do not think such is the fact. He was undoubtedly present when there was talk on that subject, and talked himself; but the evidence does not show that he counseled any such step, or favored it. His examination by the court evidences a state of mind reasonably free from any prejudice or conviction that should disqualify him from acting as a grand juror. As to the juror's having formed an opinion that would disqualify him, the action of the court in overruling the challenge has strong support in the case of *State v. Shelton*, 64 Iowa, 333, and we think the holding correct.

II. One Wile, upon examination as to his qualifications as a grand juror, was challenged by the defense, and the challenge sustained, and, under instructions from the court, took no part in the case; but his place on the panel was not supplied, and the failure to supply his place is assigned as error. Under the present law a grand jury for Bremer county is composed of five members, and the concurrence of four is necessary to the finding of an indictment. Hence, as to this case, but four of the five members of the grand jury took part, all of whom must concur to legally present the indictment, and it is urged to us that the defendant was entitled to the presence and deliberations of a full panel. Inasmuch as we regard the question as settled upon authority, our reasoning upon it would be of little, if any, practical utility. Prior to January 1, 1887, a grand jury was composed of fifteen members, and the concurrence of twelve was essential to the validity of an indictment. The same reasoning that would entitle a defendant to a full panel under the law as it now is would have entitled a party under the law as it then was to a full panel; the

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number nec-
essary to
indict.

line of argument being that it cannot be known what would have been the effect of the influence and deliberations of the absent members as to those present, and that with a full panel an indictment might not have been found. The argument is not without force, but in the case of *State v. Shelton, supra*, three of the fifteen members of the panel were excused from acting in the case because of challenges, and only twelve members took part, all of whom must concur to present the indictment. In that case this court held that the defendant was not entitled, as a matter of right, to the full panel in his particular case; that, the grand jury being legally empaneled, its organization was not affected by the absence of the three; and the indictment was sustained. We think that case ample support for the ruling of the district court in this case.

III. At the term at which the indictment was returned the defendant filed his motion to change the place of trial, on the ground of the prejudice of the judge. The defendant is a lawyer of many years' practice in Bremer county, which is and has been for many years the home of the presiding judge. The petition for the change is quite elaborate, describing with considerable minuteness many instances of defendant's experience in cases before the court, and his treatment by the court. Without any reference whatever to the merits of these particular complaints, we think the defendant believed there was prejudice against him, and that he could not have an impartial trial unless his application was granted. It is, perhaps, unfortunate that any person should be put on trial for his life or liberty with such a belief. This is the most objectionable feature of this particular branch of the case, for an examination of the record, both as to this showing for a change and the trial of the indictment, nowhere impresses us with a belief, or even a doubt, but that the utmost fairness was manifested by the court in all departments of the trial as to the defendant. Owing to the peculiar provisions of our statute, the trial judge experiences his most

8. — : change
of venue :
prejudice of
judge : duty
of court.

The State v. Billings.

delicate and embarrassing duty in passing upon the question of his own impartiality or want of prejudice for the trial of causes. The statute, in terms, is a restriction upon his inclinations or promptings to grant the change, and thus avoid comment and the embarrassments that necessarily follow his sitting for the purpose of trial after such objections are interposed. When a petition is filed, averring his prejudice, his duties are prescribed by Code, section 4374, in these words: "The court, in the exercise of a sound legal discretion, must decide the matter of the petition, when fully advised, according to the very right of it." He is not to give judgment as to his preferences, or as to the beliefs of the applicant for the change, but as to the fact of the prejudice as it appears to him. This court has frequently said that it can only interfere in such cases where the trial judge has abused the discretion with which he is invested. *State v. Mewherter*, 46 Iowa, 88; *State v. Ray*, 50 Iowa, 520.

IV. At the time of presenting the petition for a change of venue on account of the prejudice of the judge, a petition was also presented for a change of venue because of prejudice and excitement against the defendant in the county, and the application also asks that the cause be not sent to Butler or Floyd county, because of such excitement and prejudice there. This application is supported by the affidavits of some forty or fifty persons residing in such counties, a large majority of the affiants being residents of Bremer county, and their affidavits have reference only to that county. Some of these affidavits state facts showing the grounds for the belief of the affiants as to such prejudice and excitement, and they unmistakably show a high state of feeling among the people, and at least prejudice to some extent as against the defendant, and the facts undisputed show that in some instances there was talk of lynching the defendant. The affidavits of some who endeavored to get signatures to affidavits for a change of venue show that, of those approached and

4. —: —: prejudice of people: showing and counter-showing: abuse of discretion.

who refused to sign, many expressed themselves that there should be a change of place of trial, but that to make the affidavit would prompt the accusation that they were taking sides with Billings, or it would hurt them in their business. Other and particular facts are disclosed by the affidavits for the change, which need not be stated, further than that they show an intensely strong feeling against the defendant in and for miles about Waverly. This feeling was augmented by reports, and to some extent a belief, that in many respects the defendant was a dangerous and bad man. Opposed to this showing for a change of venue are the affidavits of some eight hundred residents of the three counties named, most of them, however, being residents of Bremer county. The affiants reside in the different townships in the county, and represent nearly all the business interests, and among them a large number of farmers residing outside of the villages. The substance of these affidavits is that the affiants are well acquainted with the general feeling and sentiment of the people of the county towards the defendant, and that they know of no prejudice or excitement that would prevent the defendant from having a fair and impartial trial in the county. These affidavits do not controvert the particular facts stated in the affidavits for the change, nor do they deny the facts of excitement and prejudice; but they do controvert the claim that the excitement and prejudice is so great as to prevent a fair and impartial trial. On the trial before us this point was urged by appellant with much apparent confidence, and the members of this court are agreed that the granting of the change, under the showing made, would have been in accord with the general practice in such cases, and saved from the record of the case at least the question of doubt, if the defendant had been accorded a trial under such circumstances that the verdict was not influenced by the excitement or prejudice surrounding it. While agreed as to this fact, there is not a unanimous conviction that the refusal of the court was an abuse of its discretion. A majority of the members think the

The State v. Billings.

facts of this case distinguish it from other cases wherein this court has held that the refusal of the district court to grant the change was not an abuse of discretion, and they believe and hold that it was error to refuse the change, under the showing herein made. The writer of the opinion does not concur in this view, and believes that the action of the district court does not involve an abuse of discretion, if we are to be guided by the former holdings of this court. In the opinion of the writer, the case of *State v. Read*, 49 Iowa, 85, presents a state of facts equally as strong, if not stronger, against the action of the district court than this, and its action was sustained on the ground that it had not abused its discretion. That case has strong support in the case of *State v. Perigo*, 70 Iowa, 657, and, in my judgment, those cases should control our action on this question.

V. Error is assigned to the giving of the nineteenth instruction by the court, in these words: "The jury

5. —: instructions: credibility of defendant's wife as affected by his character and motives.

must not be drawn away from the proper consideration of the charge in the indictment. The defendant is not charged in this indictment with presenting to Kingsley an infamous and false charge of seducing his wife, for the purpose of extorting money, but the charge is that he fired the shot that caused the death of Kingsley; and, even though you may believe from the evidence before you that the defendant has been a man of base and degraded life, and that he was, from sordid motives of personal gain, pressing a false charge against Kingsley, or even that defendant and his wife had conspired together to extort money from him, or that the evidence shows that the defendant was guilty of other crimes not charged in this indictment, none of such considerations will warrant you in convicting the defendant of the charge in this indictment. Nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive towards the

The State v. Billings.

deceased. Nor have you anything to do or consider with reference to what has been said about public opinion on this case, and you must give it no consideration, but confine your investigations to the charge presented by this indictment, namely: 'Did the defendant fire the shot which caused the death of Willis S. Kingsley.' To the solution of this question under the evidence before you in this case you must bring your cool, deliberate and dispassionate judgment, uninfluenced by other consideration than the evidence before you, and the law as given to you in the charge." Mrs. Billings was a very important witness for the defendant, and the criticism upon the instruction is that if the jury should find that Mrs. Billings had participated in any improper motive toward Kingsley (the man alleged to have been murdered), then the jury might consider the character and conduct of Mr. Billings, as to his having committed other crimes, or having been a man of base and degraded character, etc., as affecting her credibility as a witness. In argument to us it is not questioned but that, if such is the proper construction to be given the instruction, it is erroneous, and to the extent of being prejudicial, and should reverse the judgment. The only point urged is that it should receive a different construction, and the claim in that respect is that, properly understood, the instruction means that only the conduct of Mrs. Billings could be considered as affecting her credibility. We can readily understand that such was the purpose of the learned judge who wrote the instruction, because, thus understood, it is in harmony with a familiar rule of law; but such an understanding does not come from the language used. It is not for us to give to the language that construction which the professional mind may assume the court intended, but we must give it that meaning which the language used would reasonably convey to the jury, for it is its guide to the law of the case. It was evidently the design of the instruction, as a whole, to guard the jury against any considerations which might prejudice the rights of the defendant. The

The State v. Billings.

part of the instruction relative to the credibility of the defendant and his wife is in the nature of an exception to the restrictions urged upon the deliberations of the jury; and hence it has especial prominence in the instruction. It could not be questioned that all the acts of misconduct referred to in the instruction, and the base and degraded life of the defendant, as believed by the jury, could, under the instruction, be considered as affecting the credibility of the defendant, and the language is identically the same as to the credibility of the wife, if she participated in any improper motive towards the deceased. The instruction says: "None of such considerations will warrant you in convicting the defendant of the charge in this indictment, nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive towards the deceased." No reasonable transposition of the terms employed aids appellee's claims for construction. The pronoun "them" refers for its antecedent term to the word "considerations," being plural in form, and but a single instance of misconduct of the wife is referred to in the instruction. With the fact established that the wife had participated in an improper motive towards the deceased, the instruction allowed the jury to consider the acts and misconduct of the defendant, in regard to which she had no part or connection, as affecting her credibility. There is no claim that such is the law, nor could there well be, and the error is certainly prejudicial to the defendant. On account of the errors in giving the instruction and refusing to grant the application for change of place of trial from Bremer county, the judgment is

REVERSED.

EDWARDS *et al.* v. COSGRO *et al.*

Bill of Exceptions: TIME OF FILING: EXTENSION BY AGREEMENT. An agreement for the submission of a cause, and for a decision in vacation as of the last day of the term, does not have the effect to extend the time for filing exceptions to instructions; and where such exceptions are not filed within the three days prescribed by section 2789 of the Code, they will be stricken from the record in this court. (See cases cited in opinion.)

Appeal from Louisa District Court.—HON. J. K. JOHNSON, Judge.

FILED, MAY 15, 1889.

THIS cause was before this court on a former appeal. See 71 Iowa, 297. When our decision was rendered on that appeal the cause was remanded for further proceedings, and by agreement was tried by the district court. From a judgment rendered in favor of intervenor the plaintiffs appeal.

R. Caldwell, Arthur Springer and C. A. Carpenter,
for appellants.

D. N. Sprague, for appellee.

ROBINSON, J.—I. Appellee has filed a motion to strike from the abstract the bill of exceptions. In support of the motion it is shown that the term of court at which the cause was submitted below was finally adjourned on the twentieth day of September, 1887; that the cause was then taken under advisement by the court, with an agreement that a decision should thereafter be rendered as on the last day of said term; that the time for filing a bill of exceptions was not extended by order of the court or judge, nor by consent of parties; that the bill of exceptions was not in fact

 Wilson v. The Dunreath Red-Stone Quarry Co.

filed until the eleventh day of November, 1887, on which date the decision of the court was made of record. Section 2789 of the Code authorizes either party to an action to take and file exceptions to the charge or instructions given, or to the refusal to give any instructions offered, within three days after the verdict, and to include such exceptions in a motion for a new trial. But this court has held that an agreement of parties to extend the time for filing a motion for a new trial did not operate to extend the time for filing the exceptions contemplated by that section. *Bush v. Nichols, ante*, p. 171. In our opinion, the same rule is applicable in this case. The agreement for a submission of the cause, and for a decision in vacation as of the last day of the term of court named, did not have the effect of extending the time for filing the bill of exceptions. Section 183 of the Code authorizes such a decision, but does not extend the term at which the submission is made for any purpose. The motion must therefore be sustained. *Deering v. Irving*, 76 Iowa, 519; *State v. Leach*, 71 Iowa, 55.

II. The only questions presented by appellants for our consideration involve an examination of the evidence. Since that is not before us, the judgment of the district court is necessarily

AFFIRMED.

 WILSON V. THE DUNREATH RED-STONE QUARRY CO.

1. **Master and Servant: INJURY TO SERVANT: NEGLIGENCE OF FELLOW-SERVANT: LIABILITY.** An employer is not liable for damages sustained by an employe from the negligence of a co-employe, notwithstanding he is higher in authority than the one receiving the injury. (See opinion for authorities.) And so, in this action to recover for an injury received by an employe through defective machinery constructed and used during the absence of the superintendent and without his direction, but under the direction, as plaintiff alleges, of another employe, *held* that there was no evidence that the other employe, if he did direct the construction and use of the defective machinery, had any authority so to do, and that instructions based upon the theory that he had such authority were unwarranted and erroneous.

77	429
93	50
77	429
100	207
77	429
124	42

2. ——— : ——— : EVIDENCE : DECLARATIONS OF FELLOW-SERVANT : RES GESTÆ. In an action by a servant for an injury caused by the negligence of a fellow-servant alleged to have been a temporary vice-principal, the declarations of the fellow-servant made before and after the accident causing the injury, and no part of the *res gestæ*, are not admissible to bind the master.
8. ——— : ——— : CONTRIBUTORY NEGLIGENCE : EVIDENCE. In an action for an injury received by an employe while riding down a tramway on a car, evidence tending to show that plaintiff was warned of the danger of getting on the car, and that he knew it was a perilous ride, should have been admitted as bearing on the question of his own negligence.

Appeal from Marion District Court.—HON. A. W. WILKINSON, Judge.

FILED, MAY 15, 1889.

THE defendant and appellant is a corporation engaged in quarrying and shipping stone from its quarries at Red Rock, in Marion county. E. W. Wilson, the plaintiff, was employed by the defendant as a laborer in said quarries about December 1, 1886. The defendant undertook the construction of a double tramway down an incline for the purpose of running cars thereon to carry off strippings and other refuse from the quarry down in the direction of the Des Moines river, where it was to be dumped from the cars. The intention was to construct the double tramway so that, as one loaded car would be going down, another empty one would ascend the incline. Before the work of constructing the tramway was completed, one Stuart, who was superintendent of the quarry, went away temporarily. During his absence the force of men at work in the quarries rigged up a tackle and snatch-block fastened to a tree to let down loaded cars. An attempt was made to let down two loaded cars at one time by this means. The plaintiff and one Staley were at or near the top of the incline, and just before the attempt was made to let the cars down, one Horner, another employe, who was below, called to plaintiff to go on top of the hill and get a scraper. The evidence is in conflict as to what

Wilson v. The Dunreath Red-Stone Quarry Co.

Horner directed the plaintiff to do with the scraper. The plaintiff claims that he was directed "to go on top of the hill and get the scraper, put it on the car, and come down." Other witnesses testified that Horner directed the plaintiff to throw the scraper down over the bluff. The plaintiff brought the scraper to the upper end of the tramway, put it on one of the cars, and he and Staley got on the cars and commenced to make the descent. When the weight of the cars came upon the tackle, rigged and fastened to the tree, the pin in the snatch-block broke, the cars descended the incline at great speed, which resulted in their jumping from the track, and greatly injuring the plaintiff. The action is founded upon the alleged negligence of the defendant in using defective and dangerous machinery and appliances, by reason of which the plaintiff was injured. The defendant, by its answer, denied that any defective machinery or appliances were in use by its orders, and alleged that the plaintiff was chargeable with contributory negligence. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

C. H. Robinson, Stone & Gamble, and Kauffman & Guernsey, for appellant.

Hays Bros., for appellee.

ROTHROCK, J.—I. It is conceded that the accident happened by reason of the breaking of the pin in the snatch-block, and that the pin was defective in that it was so much worn as to be insufficient to withstand the weight of the descending cars. One of the main points in controversy is whether the snatch-block and rigging were put in position under the orders of any one who stood in the relation of vice-principal to the defendant. The plaintiff claims that Horner, the man who directed the scraper to be brought or thrown down, stood in the place of the company, and that he directed the construction of the appliance which caused the

1. MASTER and servant: injury to servant: negligence of fellow-servant: liability.

Wilson v. The Dunreath Red-Stone Quarry Co.

injury. On the other hand, the defendant insists that Horner was a mere laborer, and engaged in the same general service with the plaintiff. There is no dispute that Stuart was the superintendent of the quarries, and that one Washer was the foreman under Stuart. But Horner was an employe who worked wherever he was directed. He had charge of the tools, and kept the time of the men. It is true that at times he may have given direction to some of the employes in regard to the work at which they were engaged. But there is no evidence that he had any authority at any time to direct the construction of machinery, or to purchase tools, or make selection of appliances to be used to facilitate the work. In such case, even if it be conceded that he was foreman of the gang of laborers in the absence of Stuart and Washer, he was nevertheless a fellow-servant, and his principal is not liable for damages sustained by an employe, from the negligence of a co-employe, notwithstanding he was higher in authority than the one receiving the injury. *Sullivan v. Railway Co.*, 11 Iowa, 421; *Peterson v. Mining Co.*, 50 Iowa, 673; *Troughear v. Coal Co.*, 62 Iowa, 576; *Foley v. Railway Co.*, 64 Iowa, 644. And see Wood, Mast. & Serv., sec. 425.

As we have said, it is not claimed that the defective snatch-block was put in position for use by the direction of the superintendent, nor by Washer. It is claimed, however, that, as both were absent, Horner acted in the place of the superintendent, or, in other words, acted as and for the defendant, and that the snatch-block was used by his direction. And the jury all through the instructions given to them by the court were charged upon the theory that there was evidence from which such a finding could be made. We do not think these instructions were proper under the evidence, in view of the repeated decisions of this court as to the law applicable to cases of this character. The seventeenth paragraph of the charge to the jury is as follows: "It was the duty of the defendant to exercise reasonable care and prudence to protect the men who were employed by and working for it from injury; and if an

Wilson v. The Dunreath Red-Stone Quarry Co.

injury to one of their employes resulted from the carelessness of the defendant's superintendent, or their servant, having control, direction and management of its business, machinery and appliances, then the company is liable unless the person so injured has contributed to said injury by his own negligence." It is enough to say of this instruction that it is erroneous, because there is no evidence that Horner had authority to direct what machinery or appliances should be used. He neither had the authority of selecting, nor the power to put machinery in place. And we may say further that there is no sufficient evidence that Horner had any agency whatever, in fact, in putting the defective snatch-block in use.

II. Certain witnesses were allowed to testify to declarations and statements made by Horner relating to the snatch-block and its use. These statements were made before and after the accident, and were in no sense a part of the *res gestæ*. This evidence was objected to by defendant, and the objections were overruled. The evidence was improper. The declarations or admissions of an agent or employe, made at times far removed from the act to which they relate, are incompetent as evidence. *Lucas v. Barrett*, 1 G. Greene, 510; *Verry v. Railway Co.*, 47 Iowa, 549; *Treadway v. Railway Co.*, 40 Iowa, 526; *Hakes v. Myrick*, 69 Iowa, 189. There are many objections made to the several parts of the charge given by the court to the jury, which we do not deem it necessary to determine. As we have said, all of the instructions are based upon the idea that there was evidence from which the jury might find that Horner was a vice-principal, and represented the company as such. We think there is no such evidence, and the instructions were therefore erroneous.

III. Much of the argument of counsel for appellant is to the effect that the court erred in not sustaining a motion in arrest of judgment based upon a variance between the averments of the petition and the evidence

Wilson v. The Dunreath Red-Stone Quarry Co.

introduced upon the trial. We need not determine this question. An amendment to the petition was filed, by which it is claimed the alleged defect was cured. There is a dispute between the parties whether the amendment was filed within the time and with leave of the court. We need not determine this question. It will not arise upon a new trial.

IV. In view of a new trial it is proper that we should briefly notice one other alleged error. It is a disputed fact in the case whether the plaintiff was directed by any one to ride down the tramway on one of the cars, and whether he was warned by the bystanders that the ride would be dangerous. In the cross-examination of the plaintiff as a witness the following questions were propounded to him by the defendant's counsel: "I will ask you if you were not warned by more than one of your co-employees that it was dangerous to ride down on that car?" and "I will ask you if you did not, when you got into that car, know or have reason to know that it was a dangerous trip to make,—a dangerous ride?" Objections to these questions were sustained. The objections should have been overruled. If the plaintiff was warned of the danger, and knew that it was a perilous ride, these facts would have been an important consideration, as bearing upon the question of contributory negligence. We refer to this because more than one witness testified that the plaintiff was warned not to ride down on the car, and one of these witnesses stated that the plaintiff "said he was going to ride down or break his damned neck." For the errors above pointed out the judgment will be

REVERSED.

THE SAC COUNTY BANK V. HOOPER.

77	435
93	388
77	435
112	550

1. **Vendor and Vendee: BREACH OF WARRANTY: WHEN RECOVERY MAY BE HAD.** It is the rule in this state that, to authorize recovery upon a breach of warranty in a deed, actual ouster of the warrantee need not occur, but that there will be constructive eviction when the superior title is asserted in hostility to the title under which the warrantee holds the land. (See opinion for citations.)
2. **Tax Sale and Deed: FOR DELINQUENT TAXES NOT CARRIED FORWARD: INVALID.** The sale of land for delinquent taxes not carried forward on the tax books, as required by section 845 of the Code, is invalid. (See opinion for citations.)
3. **———: ———: VALIDATION BY TIME: FORMER ADJUDICATION.** Where a party has a tax title based upon a sale of land for delinquent taxes not carried forward, and therefore invalid (Code, sec. 845), and he conveys by warranty deed, and his grantee buys in the patent title and sues him for a breach of warranty and recovers, that is an adjudication that the patent title is superior to the tax title, and the grantor cannot, after a few years, be heard to claim that his tax title has now, by the lapse of time, ripened into a perfect title, and ask to have it quieted against his grantee. The adjudication cut off all claims based on or growing out of the title decreed to be invalid.

Appeal from Sac District Court.—HON. J. P. CONNER,
Judge.

FILED, MAY 15, 1889.

ACTION in chancery to quiet in plaintiff the title to land. A demurrer to the answer of defendant was overruled, and, plaintiff standing on its demurrer, a decree was entered for defendant. Plaintiff appeals.

Breen & Duffie and Jas. H. Tait, for appellant.

Mason & Thompson, for appellee.

BECK, J.—I. The plaintiff alleges in its petition the following matters: That the plaintiff conveyed certain land by warranty deed to defendant's grantor; that one Early, holding a tax title on the land, had

The Sac County Bank v. Hooper.

conveyed it to plaintiff; that the county treasurer had failed to carry forward to the tax list of the year for which the land was sold for taxes the prior delinquent taxes; that by reason of this omission and defect the tax title was voidable, and could have been set aside upon repayment of the taxes paid by Early; that Hunter, who held the patent title, commenced an action against plaintiff, the grantee of Early, and defendant and her grantor, to quiet the title of the lands in him; that subsequently defendant purchased the outstanding title held by Hunter, and he dismissed his action; that afterwards the defendant brought an action on the warranties of plaintiff's deed to her grantor, and received the consideration paid for the land, with interest; and that, the judgment in that action having been affirmed in the supreme court, the plaintiff paid the judgment in full. Upon these facts plaintiff claims that it is entitled to a reconveyance of the land from defendant, and prays that it may be adjudged the owner thereof, and defendant may be barred and estopped from claiming title to the land. Defendant, answering, alleges that it has been adjudicated in an action in the district court of Sac county, wherein defendant was plaintiff, and the plaintiff in this case was defendant, that defendant's title to the land is paramount and superior to the title of plaintiff. Copies of the pleadings in that action are made exhibits to the answer. Plaintiff demurred to the answer, the demurrer was overruled, and thereupon a decree was entered for defendant.

II. This action was brought upon the warranties of the deed made by plaintiff to defendant's grantor, defendant having bought the title held by Hunter, and claiming that to be the valid outstanding title.

III. Counsel of the respective parties agree that the rule in this state is that, to authorize recovery upon

<p>1. VENDOR and vendee: breach of warranty: when recovery may be had.</p>	<p>the breaches of the contract of warranty in a deed, actual ouster of the warrantee need not occur, but that there will be constructive eviction when the superior title is</p>
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The Sac County Bank v. Hooper.

asserted in hostility to the title under which the warrantee holds the land. *Brandt v. Foster*, 5 Iowa, 287; *Funk v. Cresswell*, 5 Iowa, 62; *Royer v. Foster*, 62 Iowa, 321.

IV. Delinquent taxes for previous years, it is provided by statute, shall be carried forward in succeeding

2. Tax sale and deed: for delinquent taxes not carried forward: invalid. tax books, and any sale for delinquent taxes not so carried forward is invalid. Code, sec. 845; *Barke v. Early*, 72 Iowa, 273; *Hooper v. Bank*, 72 Iowa, 280; *Dows*

v. Dale, 74 Iowa, 109; *Gardner v. Early*, 69 Iowa, 43. It is shown by the exhibits set out in defendant's answer that the delinquent taxes for which the land was sold had not been carried forward to the subsequent year, and on that ground the tax sale was held invalid.

V. Counsel for plaintiff maintains that the tax deed was not absolutely void, but voidable only, and was capable of becoming valid through the statute of limitation applicable to actions involving tax titles. Their position appears to be this: The tax deed is not void, but voidable only. Unless an action is brought to defeat the tax deed within five years, its informality is cured, and it becomes valid. In the case before us, it is insisted, no such action was prosecuted, and, as possession was held under the tax deed, when the five years had run it became valid, and plaintiff now holds a valid tax deed for the land. In our opinion, we need not consider the questions presented by counsel. The case must be determined upon other questions.

VI. The answer shows an adjudication in the action brought to recover upon the warranties in the deed, to the effect that defendant's title
 2. validation by time: former adjudication. acquired from Hunter, the holder of the patent title, was superior to plaintiff's tax-title. Plaintiff and defendants were parties to this adjudication. Plaintiff is forever estopped to deny the fact adjudicated. That fact was the superiority of the title defendant acquired from the holder under the patent title.

VII. But counsel assert that plaintiff's tax title grew into validity by reason of lapse of time and the statute of limitations since that adjudication. But plaintiff bases its title upon the same deed—the same facts—which it set up in the former action to establish the superiority of its title. In the former adjudication it was declared that it did not hold title. Now, the running of time under the statute of limitations does not give plaintiff title, for the effect of the statute is to bar objections to the title,—to defeat defenses against it; not to cure defects in it by changing the law and the facts. When the former adjudication of the case was had, the rights of the parties were settled and fixed. It was adjudicated that defendant held the title to the land which she acquired from Hunter. Surely it cannot be that, after a year or two, plaintiff's title grows into perfection from some germ of validity existing within it when the adjudication was made. Adjudications do not thus settle rights of parties, securing them to-day, and defeating them to-morrow, on the ground that lapse of time has validated those claims which by the adjudication were declared invalid. In our opinion, the decree of the district court ought to be

AFFIRMED.

REID, MURDOCK & FISHER V. ABERNETHY.

1. **Mortgage: NEW NOTES GIVEN FOR SECURED DEBT.** A real-estate mortgage continues to be a valid lien though the original notes secured thereby are defaced and new ones executed in their stead.
2. ——— : **DELIVERY: WHAT AMOUNTS TO.** A mortgage may be deemed delivered and accepted when it is executed and filed for record by the mortgagors pursuant to an agreement with the mortgagee that it should be so executed and filed. (See opinion for citations.)
3. ——— : **TO CREDITOR'S WIFE: CONSIDERATION.** A mortgage and notes made to a wife for a debt owing to the husband cannot, on that account, be set aside as fraudulent and without consideration by subsequent creditors of the mortgagors.

Reid, Murdock & Fisher v. Abernethy.

Appeal from Winneshiek District Court. — HON.
CHARLES T. GRANGER, Judge.

FILED, MAY 15, 1889.

ACTION to set aside a mortgage from T. C. Johnson to the defendant. March 9, 1887, the plaintiffs commenced an action by attachment against J. H., T. C. and S. C. Johnson, co-partners, to recover on account. On the same day the attachment was levied upon the land in question, and afterwards, on the thirtieth day of August, 1887, judgment was entered in said action against the defendants therein for seventeen hundred and one dollars and costs, with order for the sale of the lands. On the twentieth day of January, 1882, T. C. Johnson, in whom the title to said lands was, duly executed and acknowledged a mortgage thereon to defendant, to secure the payment to her of four thousand dollars, with interest, according to four promissory notes for one thousand dollars each, payable January 1, 1884, 1885, 1886 and 1887, "of even date herewith," which mortgage was filed for record and recorded on the twenty-fifth day of January, 1882. The plaintiffs allege that said mortgage is fraudulent, void and without consideration; that it was executed and accepted to defraud the existing and subsequent creditors of the maker thereof, and is held by defendant with that intent; that, before extending the credit to said Johnsons on which said judgment was rendered, they were told by the Johnsons that they owed the defendant nothing; that the defendant knew of said representations, and that they were made for the purpose of obtaining said credit; that the Johnsons are insolvent; that the notes purporting to be secured by said mortgage are without consideration, and void, and were executed solely to defeat and defraud the creditors of the Johnsons; that they were never signed or delivered until after plaintiffs' attachment was levied on the land; wherefore they ask a decree declaring said mortgage null and void, and junior and inferior to their judgment. The defendant, answering, denies generally the allegations of the petition.

 Reid, Murdock & Fisher v. Abernethy.

The case was submitted to the court, and decree rendered dismissing the plaintiffs' petition, and judgment against the plaintiffs for costs, from which they appeal. The further facts appear in the opinion.

F. S. Burling and G. R. Willett, for appellants.

L. Bullis, for appellee.

GIVEN, C. J.—I. The mortgage in question, having been executed and recorded long before the levying of the attachment, is prior in point of date. It is claimed by appellants that the mortgage and notes were not delivered to nor accepted by the defendant until after the levying of their attachment. The defendant and her husband, testifying in April, 1888, say that the defendant did not have the notes and mortgage at the time the assessor called in 1885, but each say that she had them since, three or four years prior to the time they were giving testimony. This shows a delivery long prior to the levying of plaintiffs' attachment. The defendant testified that the notes produced on the trial were not the original notes given with the mortgage; that the original notes had been written upon by the children, and were given up, and the notes produced were taken in lieu thereof. Mr. Roberts testified that he drew the notes produced on the trial at some time since June, 1886, as he knew from the fact of having changed the color of ink used in his bank at that date. We think it very clearly appears that the mortgage and original notes had been delivered to the defendant and accepted by her before the suing out of the plaintiffs' attachment. The fact that the notes originally given had been substituted by others for the same amount, and upon the same terms, would not affect the security.

II. It also appears from the testimony that the mortgage in question was executed and placed of record in pursuance of a previous agreement on the part of T. C. Johnson to give his mortgage to the defendant on the land described

1. MORTGAGE:
new notes
given for se-
cured debt.

2. — : delivery:
what amounts
to.

Reid, Murdock & Fisher v. Abernethy.

to secure four thousand dollars. We think, with such agreement, the mortgage may be deemed delivered and accepted when filed for record. *Day v. Griffith*, 15 Iowa, 104; *Deere v. Nelson*, 73 Iowa, 187.

III. It does not appear when the indebtedness of the Johnsons to the plaintiffs accrued, nor is it material, as the plaintiffs have failed to sustain their allegation that they were told by the Johnsons that they owed the defendant nothing, and that the defendant knew of such representations, and that they were made to obtain credit.

IV. The consideration for the notes and mortgage was an indebtedness from the Johnsons to Alexander Abernethy, plaintiff's husband. It is not a question of Alexander Abernethy's right to transfer the indebtedness to his wife, either with or without consideration, but whether there was an indebtedness from the Johnsons to him for which the notes and mortgage were given. While the transaction out of which the indebtedness is claimed to have arisen seems to be very poorly remembered, yet we think, upon the whole testimony, the preponderance is in favor of the conclusion that the Johnson brothers were indebted to Alexander Abernethy in the full sum of four thousand dollars, and that this mortgage was given in good faith, to secure that sum, and was given to the defendant because of an unwillingness on the part of her brothers to settle with Mr. Abernethy in any other way. We think the decree of the district court is fully sustained by the evidence, and it is therefore

AFFIRMED.

77 442
97 347

THE STATE V. THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.

1. **Criminal Evidence: LIMITATION TO TIME CHARGED: PRACTICE: INSTRUCTIONS.** On the trial of an indictment for obstructing a street on a day named, the defendant objected to evidence tending to show that on different days, before and after the day named in the indictment, the defendant obstructed the street in question. *Held* that the objection was properly overruled, and that the proper practice was for defendant to move the court to compel the state to elect on which offense it would claim a verdict, and that, in the absence of such motion, the court rightly directed the jury that defendant was guilty if it unreasonably obstructed the street "within the time mentioned in the evidence." (See opinion for citations.)
2. **Obstruction of Streets: NECESSITY OF RAILROAD COMPANY.** The obstructing of a street with cars by a railroad company is not excused by the fact that it is necessary for the carrying on of the company's business, though the obstruction be only occasional. (See opinion for citations.)
3. **——: MALICE: WILFULNESS: INSTRUCTION.** In a prosecution for obstructing a street, the court instructed the jury that it was not necessary that they should find that the defendant or its employes acted maliciously, in order to find defendant guilty, but that it was sufficient if the street was "wilfully" obstructed; and that to act wilfully means to act "intentionally or knowingly." *Held* not objectionable when considered in connection with another portion of the charge, which expressly directed that to justify a conviction they must find that the obstruction complained of was "unreasonable."

Appeal from Wapello District Court.—HON. DELL
STUART, Judge.

FILED, MAY 15, 1889.

THE defendant was indicted, tried and convicted for obstructing a street in the city of Ottumwa, and it appeals.

The State v. The Chicago, M. & St. P. Ry. Co.

Chambers, McElroy & Roberts, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—I. The following is a copy of the indictment: “The said Chicago, Milwaukee and St.

1. CRIMINAL ev- Paul Railroad Company, on the first day of
 idence: limi- September, in the year of our Lord one
 tation to time charged:
 charged: thousand eight hundred and eighty-seven,
 practice: in- in the county aforesaid, controlling and
 structions.

operating a certain line of railroad running in, upon, over and along South Market street, in the city of Ottumwa, Wapello county, Iowa, said street being a public highway in and from said city, did wilfully, unlawfully, and maliciously put, and cause to be put, engines and cars on and across said Market street and public highway, at a point on said street, in said city, at or near the bridge across the Des Moines river; and did then and there wilfully and maliciously cause and permit said engines and cars to remain on and across said street and public highway, thereby wilfully and maliciously obstructing entirely the free use of said highway, contrary to and in violation of law.” It will be observed that the act was charged to have been done on a certain day. The evidence tended to show that on different days before the finding of the indictment, and before and after the day named in the indictment, the defendant obstructed said street with cars and locomotive engines for such length of time as to interfere with travel by the public. The defendant objected to this evidence, because the prosecutor was thereby endeavoring to introduce evidence of more than one offense. The objection was overruled, and it is claimed this ruling was erroneous.

If the indictment had charged that the street was obstructed on the day named, and on divers other days, up to the finding of the indictment, the evidence would have been clearly admissible. It is common practice in this state, upon indictments charging the keeping of gambling houses and disorderly houses to prove

The State v. The Chicago, M. & St. P. Ry. Co.

distinct acts, and to submit all to the jury as constituting but one offense. We do not determine whether this may be done where a single act is charged upon a given day, as in the case at bar; but the defendant in a case of this kind should move the court to compel the prosecution to elect upon which act or offense he will claim a verdict. An objection to the evidence cannot be sustained. This appears to be the rule in all cases where the evidence tends to show that more than one offense of the kind charged was committed. Maxw. Crim. Proc. 517; *State v. Crimmins*, 31 Kan. 376; 2 Pac. Rep. 574; Whart. Crim. Law, 207.

II. The court, in the ninth paragraph of the charge, directed the jury that the defendant was guilty if it
THE SAME. unreasonably obstructed Market street
 “within the time mentioned in the evidence in the case.” This part of the charge is claimed to be erroneous, upon the ground that the jury should have been directed that they should consider but one act of obstructing the street. We do not think this objection is well taken. If the evidence was properly admitted, as we have found, it was competent for the jury to consider it the same as if the offense charged in the indictment had been laid with a continuance.

III. It appears from the evidence that the street crosses the railroad track at or near the yards where the
2. OBSTRUCTION of streets: necessity of railroad company. defendant made up its train and switched its cars. The defendant offered evidence to the effect that it was necessary in the transaction of its business, in moving and switching its cars, that they should stand in the street for a short time, and that there was a reasonable necessity for so doing. The court did not take this view of the case, and instructed the jury that necessity or convenience were not matters to be considered in determining the question of guilt or innocence. This ruling was correct. An obstruction to a highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction

Anderson & Co. v. The Union Pac. Ry. Co.

be only occasional. *Rex v. Russell*, 6 East, 427; *People v. Cunningham*, 1 Denio, 524; *Rex v. Jones*, 3 Camp. 230.

IV. The court instructed the jury that it was not necessary that they should find that the railway company or its employes acted maliciously in order to find the defendant guilty, but that it was sufficient if the street was wilfully obstructed; and that to act wilfully means to act intentionally or knowingly. It is claimed that this instruction is erroneous, because mere knowledge or intention is not sufficient to constitute the wilful act for which a conviction may be had. This part of the charge is to be considered in connection with other paragraphs, where the jury was expressly directed that to justify a conviction they must find that the obstruction complained of was unreasonable. We think that when thus considered the objection cannot be sustained. In our opinion the judgment of the district court should be

AFFIRMED.

ANDERSON & Co. v. THE UNION PACIFIC RAILWAY COMPANY, Garnishee.

GALBRAITH v. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Garnishee.

Justices and Their Courts: JURISDICTION IN ATTACHMENT: NON-RESIDENT DEFENDANTS. Under section 3511 of the Code, justices of the peace have jurisdiction of actions commenced by the attachment of property found within their respective townships, and to subject such property to the payment of the plaintiffs' claims, though the defendants do not reside in the state, and no personal service of notice is made upon them. The posting of notices in accordance with sections 3609, 3610 is sufficient to confer jurisdiction over the property. Sections 3507 and 3517 of the Code, relating to the jurisdiction of justices, and the commencement of actions before them, are not in conflict with section 3511, and do not annul it.

Appeals from Pottawattamie District Court.—HON. C. F. LOOFBOUROW, Judge.

77	445
137	351

FILED, MAY 15, 1889.

ACTIONS in attachment, brought before a justice of the peace. Judgments were rendered against the defendants and the garnishees. On appeal to the district court the garnishees insisted that the transcript of the justice of the peace showed a want of jurisdiction; but judgment was entered in the district court against the garnishees, from which they appeal.

Wright, Baldwin & Haldane, for appellants.

Smith, Harl & McCabe and *Flickinger Bros.*, for appellees.

BECK, J.—I. These actions present similar facts and involve the same questions of law. The amount in controversy being less than one hundred dollars, they are brought here by appeal upon certificates, each of which is in the following language: “Has a justice of the peace jurisdiction to entertain and take cognizance of a suit against a non-resident of the state of Iowa, and to issue a writ of attachment in said suit, to be levied upon the property of such non-resident found within the township of said justice, and enter a judgment in such suit subjecting the attached property to the payment of the plaintiff’s claim, when such non-resident defendant is not found in any county or township within the state of Iowa, and is not personally served with notice of the institution of the suit, either within or without the state, but in which the provisions of sections 3609 and 3610 of the Code were fully complied with?”

II. Code, section 3511, is in the following language: “Actions to recover personal property and suits commenced by attachment may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein within the county.” This section prescribes that the place of bringing an action by attachment before a justice of the peace shall be in the township wherein any portion of the property is found. Sections 3507

and 3509 limit the jurisdiction of justices of the peace to the county, and prescribe that suits may be brought before them in "the township where the plaintiff or defendant, or one of several defendants, resides." Section 3511 applies to actions in attachments. The other sections cited apply to actions commenced by personal service of notice. They do not, therefore, conflict, and each is of force when applied to its proper subject. Counsel insist that this section is nullified by sections 3507 and 3517. As we have just said, sections 3511 and 3507 apply to different subjects, and are not in conflict. Section 3517 provides that "actions in justices' courts are commenced by voluntary appearance or by notice." Counsel insist that actions cannot be commenced by attachments, and therefore the expression found in section 3511, "suits commenced by attachment," is a misuse of terms. It seems to us that the legislature may prescribe what shall be regarded as the commencement of an action, and declare that an attachment shall be so regarded. This is done in this section. But, without such legislative provision, an attachment is the commencement of an action where no personal service is had. It is, in such case, an action *in rem*. Actions of this character are commenced by the seizure of the *res*, which confers jurisdiction upon the court to proceed to judgment after notice by publication or by posting, which shall bind the property, but not the person, of defendant. When no personal service is had on the defendant, notice is given by posting up written notices as prescribed in Code, sections 3609, 3610. It will be readily seen that the provisions of the statute which we have cited refer to actions by attachment in justices' courts. Sections cited by counsel as being in conflict therewith apply to other subjects, viz., personal actions, or actions in the district court. There is no conflict in these several statutes. Other positions and arguments of defendant's counsel need not be considered, as it is made plain by the consideration we have stated that the judgment of the district court ought to be

AFFIRMED.

GLEASON *et al.* v. COLLETT.

Appeal: ABSTRACT MUST SHOW WHEN TAKEN. This court has no jurisdiction to entertain an appeal unless it affirmatively appears from the abstract that the appeal was perfected within six months after the rendition of the judgment appealed from. Jurisdictional facts cannot be presumed.

Appeal from Ida District Court. — HON. J. H. MACOMBER, Judge.

FILED, MAY 15, 1889.

ACTION to restrain defendant, who was a purchaser at execution sale, from removing or interfering with certain crops. There was judgment for the plaintiffs, and the defendant appeals.

L. A. Berry, for appellant.

Kiner & Riddle and *Warren & Buchanan*, for appellees.

GRANGER, J.—There is no record to justify this court in assuming jurisdiction in this case. From the abstract it appears that the judgment of the district court was entered December 20. The record then shows “notice of appeal, and service thereof on Kiner & Riddle and Warren & Buchanan, attorneys for plaintiffs, and on F. H. Hilliard, clerk of the court.” There is nothing to show the year in which the judgment of the district court was entered, nor how long after the entry of the judgment the appeal was taken. Facts essential to the jurisdiction of this court must appear on the face of the record. They are not presumed. Appeals must be taken within six months from the rendition of the judgment or order appealed from, and not afterwards. Code, sec. 3173. This appeal may or may not have been taken within the time prescribed by law. In the absence of an affirmative showing, the appeal must be

DISMISSED.

77	448
84	402
77	448
85	736
77	448
86	746

THE STATE V. MOORE.

77	449
96	256

Appeal: CRIMINAL CASE: EVIDENCE WANTING. The appellant's abstract in this case having been challenged, and he having failed to show that all the evidence in the case is before this court, the questions whether the verdict is contrary to the evidence, or whether the court erred in giving instructions, cannot be determined. The instructions, being abstractly correct, are presumed to have been justified by the evidence.

Appeal from Mills District Court.—HON. A. B. THORNELL, Judge.

FILED, MAY 15, 1889.

INDICTMENT for keeping a place where intoxicating liquors were kept for sale and sold contrary to law; trial to a jury; verdict of guilty; motion for a new trial overruled; judgment that defendant pay a fine of five hundred dollars,—to all of which defendant excepts, and from which judgment he appeals.

Watkins & Williams, for appellant,

A. J. Baker, Attorney General, for the State.

GIVEN, C. J.—The attorney general claims that it is not made to appear by bill of exceptions or otherwise from the record that the evidence taken on the trial is embodied in the appellant's abstract. This claim being made, it devolves upon appellant to show by a transcript containing a bill of exceptions all the evidence introduced on the trial, or that his abstract on file embodies all the evidence. Without such a showing, we cannot determine whether the verdict is contrary to the evidence or not, nor whether the court erred in giving instructions. The instructions given, taken together, state the law correctly, and, in the absence of a showing to the contrary, we presume they were based upon the testimony. The judgment of the district court is

AFFIRMED.

THE STATE V. McCULLOCH *et al.*

1. **Appeal: AMOUNT INVOLVED.** In an action to subject real estate to the payment of a fine of one hundred dollars and costs of \$6.70, adjudged against a tenant of the real estate for the unlawful sale of liquors therein, the amount involved is \$106.70, and an appeal lies to this court from a judgment therein without a certificate of the trial judge. The statute makes the property in such cases liable for the costs as well as for the fine.
2. **Intoxicating Liquors: UNLAWFUL SALE: FINES IN JUSTICES' COURTS: HOW CHARGED ON REAL ESTATE.** Judgments for fines and costs rendered in justices' courts in prosecutions for the violation of the prohibitory liquor law are not in any case liens on the real estate used for the unlawful sales, but may be made such in proper cases, by filing transcripts in the office of the clerk of the district court (Code, secs. 3567, 3568, 4609); and the district court has no authority, in an action brought for that purpose, to declare such a judgment, of which no transcript has been filed, a lien on real estate, and to direct the same to be sold for its satisfaction.

Appeal from Mahaska District Court.—HON. D.
RYAN, Judge.

FILED, MAY 15, 1889.

ACTION to subject real estate to the payment of a judgment. There was a trial by jury, and a verdict and judgment for defendants. The plaintiff appeals.

Haskell & Greer, for appellant.

John F. Lacey, Wm. R. Lacey and D. C. Waggoner,
for appellees.

ROBINSON, J.—Defendants were the owners of certain real estate in Oskaloosa, known as the “Downing House Property,” and leased it to one Kelly. He sublet a portion of it to others. On the fifteenth day of July, 1887, a clerk of the subtenants was convicted

in justice's court of violating the provisions of chapter 6 of title 11 of the Code, in regard to the sale of intoxicating liquors, and was adjudged to pay a fine of one hundred dollars, and the costs of suit, taxed at \$6.70. The petition alleges that the defendants knew that intoxicating liquors were being kept in said premises for sale, and were sold, in violation of law, during the time in question, and asks that the premises be subjected to the payment of the fine and costs against the clerk.

I. Appellees insist that this court has no jurisdiction of the case, for the reason that the amount in
 1. **APPEAL:** controversy does not exceed one hundred
 amount dollars, and no question of law has been
 involved. certified for its determination. The appellant contends that the amount in controversy includes both the fine and costs, and therefore that it is \$106.70. The petition alleges that the fine and costs are wholly unpaid. The statute authorizes the same ruling with respect to costs that it does in regard to fines; hence the full amount of both, as alleged in the petition, must be regarded as in controversy.

II. It is insisted by appellees that the relief demanded by appellant cannot be granted, for the
 2. **INTOXICATING** reason that no transcript of the judgment
 liquors:
 unlawful sale: has been certified to the office of the clerk
 fin in jus-
 tices' courts: of the district court of Mahaska county.
 how charged
 on real estate. Section 1558 of the Code, as amended by section 12, chapter 66, Acts of Twenty-first General Assembly, provides that, for all fines and costs assessed or judgments rendered for any violation of the chapter of the Code relating to the sale of intoxicating liquors, the premises and property, personal and real, occupied and used for the purpose, with the knowledge of the owner, shall be liable, and that all such fines, costs and judgments shall be a lien on such real estate until paid. The language of the section, considered alone, is broad enough to make judgments rendered by justices' courts liens upon real estate from the date of their rendition, without the taking of further steps. But that such was

not the effect intended by the general assembly is evident, when other provisions of the Code are considered. It is contrary to the spirit and policy of our law to permit the title to real estate to be affected by judgments of justices' courts. They are not courts of record. Executions to enforce their judgments issue only against personal property. Code, sec. 3570. The action of forcible entry and detainer for the recovery of the possession of real estate is allowed in justice's court, but, even in such action, the question of title cannot be investigated. Code, sec. 3620. When the title to real estate is put in issue, it becomes the duty of the justice, without proceeding further, to certify the cause and the papers to the district court. Code, sec. 3535. Liens on real estate may be secured by causing a transcript of the judgment in justice's court to be certified to and filed in the office of the clerk of the district court (Code, secs. 3567, 3568); and when that is done the judgment, for all practical purposes, becomes a judgment of the district court. *Id.* Judgments for fines in all criminal actions may be made liens on real estate in the same manner, and with like effect, as judgments in civil actions. Code, sec. 4609.

Judgments of the supreme and district court are liens upon real estate of the judgment debtor in certain cases. Code, sec. 2882. No personal judgment against the property-owner for the fine and costs adjudged against the violator of the law is authorized in proceedings of this character. Their purpose is to ascertain if the premises in which the law was violated are liable for the payment of the judgment rendered on account of the violation. *Polk County v. Hierb*, 37 Iowa, 366. In that case it was held that, before such property can be taken for the payment of a judgment of the nature of that in question, its liability must be duly established in a proceeding to which the owner is a party. But the property cannot be said to be liable for the payment of the judgment, unless it can be levied upon and sold to satisfy it. Execution can issue in this cause only to

satisfy the costs which accrued herein. The district court cannot in the first instance, nor can this court on appeal, authorize the sale of real estate on execution from justice's court. In our opinion, the statute under consideration, was not designed to make judgments of justices' courts liens on real estate, nor to subject real estate to sale on execution issued from such courts, in any case. Therefore, when this cause was tried, and judgment rendered in the district court, the property in question was not liable to the payment of plaintiff's judgment. What plaintiff really asks us to determine is that, if it should file a certified transcript of its judgment in the office of the clerk of the district court, it could then subject the property in question to the payment of its judgment. But an adjudication to that effect would not create a lien on the property. Plaintiff may conclude not to file the transcript, or when it is filed defendants may have ceased to have any interest in the property. In either case, the adjudication asked by plaintiff would prove to be but an idle form. Courts are required to determine the effect of established, not hypothetical, facts.

III. In view of the conclusion we reach as to the merits of the case, the alleged errors of which appellant complains are wholly immaterial, and need not be further considered. Since the judgment of the district court is the only one which could have been rendered under the admitted facts of the case, it is

AFFIRMED.

STRAHAN V. THE TOWN OF MALVERN.

1. **Cities and Towns: PURCHASE OF LAND FOR STREET: COLLUSION AND FRAUD: EVIDENCE.** In an action against the defendant town for the price of land sold it for a street, the defense was that the purchase was unlawful, on the ground that it was in fact made for the benefit of a railroad company which desired the ground for a right of way, and that the plaintiff and others combined together to have the land procured for the railroad company, but ostensibly for the town. On this issue, *held* that evidence was properly admitted tending to show that the company was at the time of the purchase trying to get the right of way, and the record of condemnation proceedings was competent for that purpose, though the awards had not been paid. Also, that the testimony of one who was mayor of the town at the time, as to what was said and done by the town council, as showing the purpose of the council in establishing the street for which it was pretended the land was wanted, was material to the issue and properly admitted.
2. ——— : ——— : ——— : **INSTRUCTIONS.** In such case the court properly gave instructions to the effect that the jury should not inquire as to the necessity of the street for which the land was ostensibly bought, that being a matter for the discretion of the town council, but that they should inquire as to the purpose of the council in establishing the street; that is, whether the real design was to establish a street or to procure a right of way for the railroad company.
3. ——— : **ORDINANCE ESTABLISHING STREET: PRESUMPTION AS TO PUBLIC PURPOSE: EVIDENCE TO REBUT.** When a town council has passed an ordinance establishing a street, it must be presumed that it was established for public use; but where it is claimed that the real purpose was to provide a right of way for a railroad,—which is not a public purpose within the meaning of the law as to the authority of the council in such cases,—the fact may be shown by evidence overcoming the presumption.
4. ——— : **PROCURING LAND FOR RAILROAD: ULTRA VIRES.** The purchase of land by a town for the use of a railroad for right of way, though ostensibly for a public street, is *ultra vires* and the purchase price cannot be collected by one having knowledge of the facts and aiding in the transaction.

Appeal from Mills District Court.—HON. A. B. THORNELL, Judge.

FILED, MAY 15, 1889.

ACTION to recover for land sold to the defendant town for an avenue. Judgment for defendant and plaintiff appeals.

E. B. Woodruff, P. P. Kelley and L. T. Genung,
for appellant.

W. S. Lewis and Stone & Gilliland, for appellee.

GRANGER, J.—In 1879 the defendant town adopted an ordinance, and went through the legal forms of establishing within its limits what is known as “Union avenue,” and plaintiff avers that by an agreement with the defendant he purchased the land on which the avenue is located for the defendant, and for which the defendant was to pay him three thousand and twenty-four dollars, with interest at ten per cent. until paid. The defendant’s claim is that the land was never designed by the town as an avenue, but only as a right of way for a railroad, and for which purpose it was taken and used, and that the town council, in the steps taken by it to establish an avenue, was acting in concert with the plaintiff and others to indirectly secure a right of way for the railroad at the expense of the defendant town; that it was a fraudulent combination between plaintiff and others, with no intention whatever to provide an avenue for public use.

I. The essential fact for the disposition of the case is, did the counsel of the defendant town agree with the plaintiff to pay for the strip of land for the purpose of an avenue or for the right of way for the railroad? This seems to have been the view substantially taken by the district court, and the question properly for us is, were the testimony and instructions legitimate to the inquiry? The railroad company had taken steps to condemn the right of way through the town and over

1. *CITIES and towns: purchase of land for street: collusion and fraud: evidence.*

Strahan v. The Town of Malvern.

the land in question, and the record of these proceedings was put in evidence, against the objections of the plaintiff, on the ground that the awards were not paid. As the jury must pass upon the question of the purpose of the proceedings of the council, and the agreement with the plaintiff as to this particular piece of land, and under the allegation that the purpose of all parties was to secure a right of way for the railroad, and not in fact an avenue, it was proper for the jury to be placed, as nearly as the testimony could place it, as the parties were at the time of the transactions, to ascertain their purposes; and the fact that the railroad company was at that time endeavoring to get the right of way would be proper for consideration, and also what was done, with the knowledge of the parties charged with the collusion. The record does not show, as claimed by appellant, that the jury were left to infer that the right of way was condemned for the railroad company; and it appears that this testimony was admitted only to show that the company was trying to get the right of way, and as one link in a chain of evidence tending to prove that the acts of the council and the plaintiff were to secure it for the company, and in the manner claimed by the defendant.

II. Error is assigned as to the testimony of one H. E. Boehner, who was at the time mayor of the town,

and who gave testimony as to what occurred
THE SAME. at the town council, and, among other questions, was this: "What, if anything, do you know as to what caused the council to pass the ordinance establishing Union avenue?" Against the objection that it was incompetent and immaterial, the witness answered, and the answer discloses that before the passage of the ordinance the company was grading its road on the land in question; that it was talked that the council had not the right to pass the ordinance; that the plaintiff would take and hold the warrants to be issued; and that the legislature could be induced to pass an act authorizing the town to bond its indebtedness; that a bond had been given by plaintiff and

Strahan v. The Town of Malvern.

others for the right of way for the railroad through the township; that the road was then partially constructed over the land in question; with other facts tending to show the purpose of the ordinance. Under the allegations of a fraudulent conspiracy or arrangement to defraud the tax-payers by a pretense to establish an avenue, when the real purpose was to purchase the right of way, this testimony was clearly competent and material. Without such a rule it would be almost impossible to establish the fact of such a combination. It was a question of the intent or purpose with which they acted.

III. Counsel, in argument, present objections to several instructions given by the court, and parts of instructions, on the theory that they contravene the right of the defendant town to purchase land for street, park or other public purposes, and hence that they are erroneous. Such is not the legal import of the instructions. On the contrary, they clearly recognize the right of the town to make such purchases, and hold that if such a contract was made with the plaintiff he is entitled to recover. The fourth, fifth and sixth instructions by the court indicate the tenor of its instructions throughout, and of themselves answer many of the objections presented, and to that end they are here inserted: “(4) The powers that can be lawfully exercised by a municipal corporation like the defendant are such only as are enumerated in the statute. They cannot lawfully go beyond or exceed the authority granted to them by the statute, and the trustees of such corporation cannot by indirection appropriate the funds or pledge its credit to assist improvements or projects to which the statute of the state does not authorize them to give assistance. (5) The question to be determined by you in this connection is, was the credit of said town, or its funds, appropriated to purchase land to be used for a street, or was such appropriation in fact made to purchase right of way for said railroad company? If the purpose was to purchase land to be devoted to the use of a street for

Strahan v. The Town of Malvern.

said town, you have no right to inquire whether there was need of such street, or whether the location thereof was wise or unwise. Said trustees had the right to determine the necessity for streets, and establish the same in said town, and the wisdom of their course in determining what streets should be established is not reviewable in this court. But whether the funds or credit of said town were appropriated to purchase land for a street or for right of way for said railway company is a proper subject of inquiry, and if you should find from the evidence that under the semblance of purchasing lands for a street said trustees of said town were in fact purchasing the right of way for the railway company, then they were acting beyond the scope of their authority, and the contract entered into with reference thereto cannot be enforced. (6) If you should find from the evidence that when said street was established by the trustees of the town, and the contract therefor entered into with plaintiff, the purpose in so doing was to provide a street for the use of the town, it will make no difference that soon thereafter the right of way thereon was granted to the railway company. To be invalid, the original object in establishing said street, and in purchasing the right of way therefor, must have been by indirection thereby to furnish a right of way for the railroad company. The question whether said appropriation was made, and the contract entered into with plaintiff, for the purpose of providing a street for the town, or for the purpose of buying the right of way for the railroad company, are questions of fact, to be determined by you from all the evidence and circumstances of the case." These instructions go so far as to preclude the jury from making inquiry as to a necessity for an avenue, but limit inquiry as to the purpose of the council in passing the ordinance, *i. e.*, did the council design the establishment of an avenue or the procurement of a right of way?

IV. It is urged that after the passage of the ordinance establishing the avenue it must be taken as true

Strahan v. The Town of Malvern.

3. — : ordinance establishing street : presumption as to public purpose : evidence to rebut.

that it was established for public use as such. That is true, *prima facie*. But the fact, as thus established, may be overcome by proofs sufficient to show the facts otherwise. There is nothing in the cited cases of *Bankhead v. Brown*, 25 Iowa, 540, or *Town of Cherokee v. Land Co.*, 52 Iowa, 279, not in harmony with this view. In the latter case it is held that the council is clothed with authority to determine the wants and necessities of the public, and that its action in exercising this power cannot be questioned on the ground that it is in conflict with the public interest. But it holds that "the court may inquire whether land appropriated by a city is taken for public purposes;" and that is the inquiry in this case. "Public purposes," within the meaning of the law as to the authority of the council in such cases, would not mean a right of way for railroad purposes.

V. As against the claim that the action of the town council was *ultra vires*, we are referred to *City of Marshalltown v. Forney*, 61 Iowa, 578, and

4. — : procuring land for railroad : *ultra vires*.

council urge that this case does not differ from that in principle. That was a case in which an alley was vacated in order that an opera-house might be built by an individual, and the point was made that the act of the council was *ultra vires*, and the court held otherwise, on the ground that the council was vested with the power to vacate streets and alleys; that the act of vacation put an end to the public interest in the land; and, in substance, that it was a matter of no public concern that the land was devoted to a private purpose. It is not claimed in that case that the act of vacation was not a conscientious one, in the public interest. How different the case at bar. Here the council, although pretending to establish an avenue for public use, are using the power they possess as agents for the public to impose upon it an unlawful burden of taxation. This the jury must have found. The distinction between the two cases is too plain to require further comment.

 Spence v. McDonough.

IV. The testimony of the plaintiff leaves little if any room for doubt that the finding of the jury was right. His statements show that the whole purpose of the council and other parties was at the time to secure for the railroad company a right of way through the town, and it was felt that it should be made a public burden by way of taxation. However well equity, from the stand-point of a public enterprise, would clothe the effort, it was a plain violation of the letter and spirit of the law, and the courts cannot sanction it.

AFFIRMED.

77	460
77	578
77	460
88	895
77	460
92	302
77	460
101	704

SPENCE *et al.* v. McDONOUGH.

Injunction: DECREE NOT WARRANTED BY PLEADINGS AND EVIDENCE:
WATERS: APPEAL. Plaintiffs in this action sought to enjoin defendant from damming and polluting the water of a stream. The real grounds of their action were that defendant had no right to dam the stream, and that he had no right to permit hogs to have free access to it. The court rendered a decree enjoining defendant "from so damming or obstructing the natural flow of the water in the creek as that the same shall become stagnant and foul in any manner, so that the water shall be unwholesome for plaintiffs stock." *Held—*

- (1) That this was an adjudication in defendant's favor that he had a right to dam the stream, and must be taken as the law of the case as against plaintiffs, since they do not appeal.
- (2) That since defendant had the right to dam the stream, and plaintiff did not complain of an abuse of that right resulting in the pollution of the water, but attributed the pollution to the fact that hogs were permitted to have access to it, and the evidence followed that theory, the decree restricting the right to dam was not warranted either by the pleadings or the evidence.

Appeal from Delaware District Court.—HON. JOHN J. NEY, Judge.

FILED, MAY 16, 1889.

ACTION in equity to enjoin defendant from damming and polluting the water of a stream. There was a trial, and a decree in favor of plaintiffs. The defendant appeals.

Yoran & Arnold, for appellant.

Herrick & Doxsee, for appellees.

ROBINSON, J.—The parties to this action own adjoining farms, which are devoted in part to the business of stock-raising. These farms are intersected by a water-course, which in ordinary seasons contains a stream of water which flows from the farm of defendant southward across the land of plaintiffs, and is sufficient for the stock of plaintiffs and defendant. In the spring or early summer of 1887, defendant constructed a dam across this water-course, a few feet north of the land of plaintiffs, which had the effect to create a pool of water six or eight inches deep, fifteen or twenty feet wide and five or six rods long. That dam was afterwards replaced by another, made in part with a large watering trough, but the effect was about the same as that of the first dam. It is claimed by plaintiffs that the dam obstructs the flow of a natural and permanent stream, to their damage; that if it were unobstructed it would furnish all the water needed for their stock, as it had done for many years previous to the building of the dam, but that the dam has so obstructed the flow of water that it is insufficient for their stock; that when the flow is not entirely stopped the water is so impure in consequence of the acts of defendant as to be unfit for the use of stock. Defendant admits the construction of the dams, but insists that they were made necessary by lack of rains in 1887; that he did no more in constructing them than was necessary to obtain a sufficient supply of water for his own stock; and that the diminished flow onto the land of plaintiffs was not due to any unauthorized act on his part.

The evidence shows that the season of 1887 was unusually dry; that the stream in question was much

Spence v. McDonough.

affected by the drought; that in the driest time most, if not all, the water collected by defendant came from springs on his own land, and that his device for obtaining a supply of water was a common one, and that it did not give a greater supply of water than his stock required. Some of the evidence tends to show that at times a scum formed on the surface of the pool above the dam and flowed thence onto the land of plaintiffs. The decree rendered by the district court perpetually enjoins defendant "from so damming or obstructing the natural flow of the water in the creek" where it crosses the land of defendant above that of plaintiffs, "as that the same shall become stagnant or foul in any manner, so that the water shall become unwholesome for the use of plaintiffs' stock." The decree, by necessary implication, holds that defendant had a right to construct the dam. Since plaintiffs do not appeal, that must be regarded as the law of this case, and we are only required to determine whether the law and the evidence justify the limitation fixed by the decree, which is, in effect, that the natural flow of the stream shall not be so obstructed as to render the water which flows from the obstruction onto the premises of plaintiffs unwholesome for the use of their stock.

The right of defendant to use all the water of the stream, if so much is required by his stock, seems to be recognized by the decree, and is sanctioned by law. Washb. Easem. 331; Gould, Waters, sec. 205; Ang. Water-Courses, 128; *Miner v. Gilmour*, 12 Moore, P. C. 156; *Stein v. Burden*, 29 Ala. 127. It is well settled, also, that the lower owner on a water-course has a right to have the water which flows from the land of an upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit. The latter has no right to pollute the water unnecessarily. Washb. Easem. 331-334; *Dumont v. Kellogg*, 29 Mich. 420; Wood, Nuis., sec. 427 *et seq.*; Cooley, Torts, 587; *Gladfelter v. Walker*, 40 Md. 13. The evidence shows that the supply of water secured by means of the dam was

Spence v. McDonough.

not more than the stock of defendant needed. At times it was insufficient. The stream was so small that the needed supply could be accumulated only by means of a reservoir. If scum formed on the pool, it was because of the dry and hot weather, and not because of an unnecessary accumulation of water. But the pollution of water complained of by plaintiffs in their petition is not that which results from stagnation. They complain that the dam prevents all flow of water from defendant's onto their premises in ordinary times, and that defendant "for several years past" has maintained on his premises hog-pens upon and over the water-course, and has "kept therein a large number of hogs, thus polluting the water of said creek, and rendering it unwholesome for the use of plaintiffs' said stock; and defendant now maintains said pens, and keeps therein a large number of hogs, as stated, with the effect as above stated." The petition does not charge that the water became stagnant or foul by reason of the dam. That is complained of only on the ground that "in ordinary times" it wholly prevents the flow of water from the premises of defendant onto the premises of plaintiffs.

It is conceded by appellees that the use of the land of defendant, through which the stream flows, as a hog pasture is not involved on this appeal. The evidence as to the pollution of the water was chiefly directed to its use for hogs. There is but little evidence as to the condition of the water in the pool as a result of stagnation. If it be admitted that the allegations and prayer of the petition are broad enough to permit the relief against stagnant water given, yet we are of the opinion that plaintiffs failed to show that the condition of the water, if stagnant and unwholesome, was due to any unauthorized act of the plaintiffs. No doubt the defendant should be restrained from so interfering with the stream as to unnecessarily injure the plaintiffs, but, until he has done or has threatened to do some unauthorized act, he should not be subjected to the annoyance and expense of litigation. The relief granted by the district court would have been proper, had it been supported by the

def

McKee v. McKee.

pleadings and the evidence. In fact, it was not that which plaintiffs sought. The real grounds of their action were, in substance, that defendant had no right to dam the stream, and that he had no right to permit the hogs to have free access to it. Neither of these grounds is involved in this appeal. We conclude that the decree of the district court should be REVERSED.

77	464
82	464

McKEE v. McKEE.

DIVORCE: INHUMAN TREATMENT; FACTS NOT CONSTITUTING. Action by a wife for a divorce on the ground of inhuman treatment endangering her life. The parties were married in 1872, and five children had been born to them. Each had children by a former spouse. At the time of their marriage plaintiff was thirty-four, and defendant fifty-five, years old. The evidence (for which see opinion) shows that the parties had lived unhappily together on account of a variety of troubles growing out of jealousies and other causes, and that they had twice separated, but fails to show that plaintiff's health was seriously or permanently impaired by the treatment of which she complains, or that she was free from faults contributing to their unhappiness, but rather leads to the conclusion that much of the trouble which led to their separation was due to plaintiff's poor health and indiscreet conduct, and defendant's age and its consequences. *Held* that a divorce was properly denied.

Appeal from Poweshiek District Court.—HON. W. R. LEWIS, Judge.

FILED, MAY 16, 1889.

THE plaintiff asks a decree divorcing her from defendant, and awarding her alimony and the custody of minor children. Her petition was dismissed on the merits on final hearing, and judgment rendered against defendant for costs. The plaintiff appeals.

W. H. Redman and Cole, McVey & Clark. for appellant.

Scott & Clute, for appellee.

ROBINSON, J.—The plaintiff was married to defendant in May, 1872. She was then thirty-four years of age, and the mother of two children by a former husband. The defendant was about fifty-five years of age, and had been previously married to a woman who was then living, but who had obtained a divorce from him. He also had several children, fruits of his first marriage, then living. Plaintiff had known the defendant personally but a short time before she married him; one week, it is said, being all the time required for the courtship and marriage. Before the wedding took place plaintiff knew that defendant and his first wife did not live happily together, and had been warned that she would have trouble with him. She lived with him after their marriage until May, 1884, when she left him, and commenced an action for divorce. That was compromised, the defendant paying her six or seven hundred dollars, and conveying to her real estate of the value of about three thousand dollars, and she returned to his home in September, 1884. They lived together from that time until September, 1886, when plaintiff again left defendant, and a few months afterwards she commenced this action. Five children have been born to these parties. Of the children, one boy, born in October, 1873, and another born in June, 1877, were sent to the State Industrial School at Eldora, on the application of both parents, in November, 1886. One girl born in June, 1875, another born in May, 1879, and a boy born in May, 1882, remained under the control of the father.

Plaintiff claims that defendant has been guilty of such inhuman treatment as to endanger her life. The evidence on her part tends to show that defendant on numerous occasions accused her of want of chastity; that he sometimes used profane language in addressing her; that he was guilty of eavesdropping; that he accused her of spending unnecessary time in the streets,

to the neglect of her house-work; that he was lacking in kindness to her when she was sick; that he frequently spoke to and of her in a disparaging manner, in the presence of their children; and that on several occasions he punished some of the children with undue severity. Defendant denies much of the testimony as to his alleged bad conduct, and explains much of it in a manner which makes it seem less to his discredit than is claimed by plaintiff. We think the evidence fairly shows that during the last few years of their married life the defendant was jealous of the attentions of a family physician, and frequently charged plaintiff with improper conduct with him. The evidence does not show any unchaste intercourse between the plaintiff and the physician, and defendant concedes that there was none, but his feelings were not wholly without foundation. Plaintiff knew of her husband's feelings towards the physician, yet persisted in requiring his professional services frequently. The physician, with knowledge of the fact that defendant believed improper relations to exist between him and plaintiff, visited her frequently, and at times daily, for weeks together. Many of these visits were made after the last separation, but the fact that they were permitted tends to show that the remarks of the husband in regard to plaintiff and the physician were not wholly without cause. It is not claimed that the physician in question was more skilful or more accessible than others. Some of the evidence tends to show that at times the condition of plaintiff was such that charges of unchastity would affect her health, and, if made while sick, would retard her recovery. But a careful examination of all the evidence convinces us that none of the conduct of which plaintiff complains had any serious or permanent effect upon her health. In fact, her general health seems to have been better when she was living with defendant than it was during her absence from him. She was affected by troubles incident to her age, her nervous system was somewhat affected, and she suffered from other ailments, but we think none of them were caused or seriously aggravated

McKee v. McKee.

by the conduct of defendant. Many things occurred which disturbed the harmony which should have existed between them. He offended plaintiff by visiting the woman from whom he had been divorced during her last sickness, and by erecting a family monument after her death, on which she was described as his wife. His conduct no doubt was censurable in many respects. There was some trouble at one time between him and a son of plaintiff by her first husband. But she was not by any means blameless. She was guilty of improper language and of censurable conduct other than that already stated. She does not seem to make defendant's treatment of herself her chief ground for desiring a divorce, but complains much of his treatment of the two boys who were sent to the industrial school. It is claimed by plaintiff, and denied by defendant, that on two or three occasions he punished the boys in a cruel manner. But aside from those occasions defendant appears to have shown as much consideration and as much affection for his children as was manifested by plaintiff. Some of the acts of which she now complains were treated by her at the time of their occurrence as of little or no consequence, or as occasions for merriment. We are satisfied that much of the trouble which led to the separation of plaintiff and defendant was due to her poor health and indiscreet conduct, and to his age, and its consequences.

We conclude that plaintiff has failed to establish any ground for divorce recognized by our statute. The judgment of the district court is therefore

AFFIRMED.

77	468
77	690
77	468
130	676
77	468
132	272

MCLAIN V. CALKINS.

Forcible Entry and Detainer: NOTICE TO QUIT: WHEN GIVEN. In order to maintain an action of forcible entry and detainer against a tenant holding over after the termination of his lease, the three days' notice to quit, required by section 3614 of the Code, need not be given after the termination of the lease. All that is required is that it be given three days before the suit is begun. In this case it was given one month prior to the expiration of the term, and the suit was brought the day after the term expired, and it was *held* sufficient. (See citations in opinion, and compare *Drain v. Jacks*, *post*, p.—.)

Appeal from Cerro Gordo District Court.—HON. G. W. RUDDICK, Judge.

FILED, MAY 16, 1889.

ACTION before a justice of the peace in forcible entry and detainer. A demurrer to the petition was overruled by the justice of the peace on the ground that the petition does not show the three-days notice to quit required by Code, section 3614. This demurrer was renewed in the district court, and a motion to dismiss the cause, based on the same ground as the demurrer, was made by defendant and sustained. The case was tried to a jury in the justice's court, and a judgment entered upon a verdict for plaintiff. Defendant appealed to the district court, where a motion to dismiss the cause on the ground that the three-days notice was not given was sustained. Plaintiff appeals.

Sherwin & Schermerhorn, for appellant.

Blythe & Markley, for appellee.

BECK, J.—I. The petition alleges that defendant leased the land in question of plaintiff, the term expiring September 25, 1887, and that on the twenty-fifth of August, 1887, plaintiff served upon defendant a notice to quit the possession of the land within thirty days. The petition was filed September 26. It will be observed

McLain v. Calkins.

that the notice to quit was served before the expiration of the term, and the suit was commenced a day thereafter.

II. The only question presented by the case is this: Was timely notice to quit, in compliance with the statute, given to defendant? The statute (Code, sec. 3611, par. 2) authorizes an action of forcible entry and detainer against a tenant holding over after the expiration of or contrary to the terms of his lease. Code, section 3614, provides that before such suit can be brought "three days' notice to quit must be given to the defendant, in writing." Defendant insists that the notice to quit must be given after the expiration of the term, and plaintiff contends that it may be given before. This statement presents the exact contention of the parties. In our opinion the notice may be given before the expiration of the term. The statute does not prescribe at what time, whether before or after expiration of the term, the notice shall be given. It simply provides that the notice shall be three days before the commencement of the action. It is not bad if it is given more than three days before the commencement of the suit. *Shuver v. Klinkenberg*, 67 Iowa, 544. Defendant's position would secure the defendant in the possession of the land for three days after the expiration of the lease. It would, in effect, give the defendant three days longer term than the lease gives him. Surely it was not the purpose of the legislature to thus interfere with the contract, and give the defendant a right his lease did not secure. The object of the statute is to provide that the tenant shall be notified of the expiration of the lease, so that he may have three days in which to make preparation for the vacation of the premises, being advised that the lessor demands possession. Its intention is not to interfere with the contract between the parties and secure defendant in the possession of the land three days longer than his term. In support of these conclusions, see *Leutzey v. Herchelrode*, 20 Ohio St. 334; *Hawley v. Robeson*, 14 Neb. 435; 16 N. W. Rep. 438. It is our opinion that the judgment of the district court ought to be

REVERSED.

77	470
81	192
77	470
97	555
100	691

EYERLY V. THE SUPERVISORS OF JASPER COUNTY.

1. **Taxes: ILLEGAL: PAYMENT: RECOVERY: LIMITATION OF ACTION.** Where illegal taxes are paid, as to an action for their recovery the statute of limitations ordinarily begins to run from the time of payment. (See opinion for citations.)
2. ———: **IN AID OF RAILROADS: COUNTY TREASURER IS TRUSTEE.** Where money is paid into the county treasury under the provisions of the law for voting taxes in aid of the construction of railroads, such money in the hands of the treasurer is a trust fund, and the tax-payer and the railroad company are both beneficiaries. (Compare *Des Moines & M. Ry. Co. v. Lowry*, 51 Iowa, 486.)
3. ———: ———: **PAYMENT: SUBSEQUENT DECREE OF INVALIDITY: RECOVERY: LIMITATION OF ACTION.** Where taxes voted in aid of the construction of a railroad were paid, and soon thereafter a suit was begun by the payers and others against the railroad company to test the validity of the tax, and it was subsequently decreed to be invalid, *held* that while such action was pending the statute of limitations did not run against an action of *mandamus* to compel the supervisors of the county to order a refunding of the tax so paid.

Appeal from Jasper District Court.—HON. W. R. LEWIS, Judge.

FILED, MAY 16, 1889.

ACTION for *mandamus* to compel the defendants to refund moneys paid in pursuance of taxes voted to aid in the construction of a certain railroad. There was judgment for the defendants, and the plaintiff appeals.

Winslow & Varnum, for appellant.

Harrah & Myers, for appellees.

GRANGER, J.—Counsel in argument concede that the case presents here but a single question,—the statute of limitations. The facts are before us, as found by the court below, and were evidently found with reference to the several issues presented by the pleadings, but, for the purpose of the question before us, they may be very much abridged, and they are as follows:

Eyerly v. Supervisors of Jasper County.

In 1881 the township of Newton voted taxes to aid in the construction of the New Sharon, Coal Valley & Eastern Railroad. The taxes were levied, and those in controversy paid to the treasurer of Jasper county, who is a defendant herein. The particular taxes in question were paid by the plaintiff, F. T. Campbell and J. H. Hiatt; the claims of Campbell and Hiatt being before the commencement of this suit assigned to the plaintiff. The payment of the tax by plaintiff was, May 8, 1883, \$52.89; that by Campbell, February 28, 1883, \$99.38; and that by Hiatt, February 28, 1883, \$29. In March, 1883, the plaintiff's assignors and others commenced a suit in the circuit court of Jasper county against the railroad company and others, to test the legality of the tax as voted and levied, and in July, 1884, such tax was declared illegal and void, and such decree was afterwards affirmed in this court. Thereafter, in August, 1885, the plaintiff and his assignors petitioned the defendant board for an order on defendant treasurer for a repayment of the illegal taxes so paid, which petition was refused by said board. The case at bar was commenced on the twenty-seventh day of July, 1887.

The provision of the statute under which it is claimed this action is barred is a part of section 2529 of the Code, and reads as follows: "The following actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided: * * *

(3) Those against the sheriff or other public officer, growing out of liability incurred by the doing of an act in an official capacity, or by the omission of an official duty, including the non-payment of money collected on execution, within three years." This action is evidently founded upon the failure of the defendants, as officers, to perform an official duty; for it seeks an order requiring them to perform such a duty. Appellant's contention in the case is that the defendant treasurer, in collecting and disbursing the taxes so voted, is in legal contemplation a trustee of an express trust, and that the provisions of the statute, as quoted, are not applicable in

Eyerly v. Supervisors of Jasper County.

such a case. We have found no adjudicated case, to use the familiar expression, "on all fours" with this. In making distinctions which necessarily arise, it is highly important to keep in view the facts upon which each ruling is announced. This court has repeatedly

held that, where illegal taxes are paid, as to an action for their recovery, the statute of limitations begins to run from the time of payment. *Hamilton v. City of Dubuque*, 50 Iowa, 213; *Scott v. County of Chickasaw*, 53 Iowa, 47; *Callanan v. County of Madison*, 45 Iowa, 561. These are all cases in which the taxes collected were for governmental purposes, and for which the county was liable under the provisions of the Code, section 870, or a city for taxes illegally collected by it. The liability in these cases in no manner depended upon whether or not the money collected has been paid out.

Where money is paid in under the provisions of the law for voting taxes in aid of the construction of railroads, it has been held that such money in the hands of the treasurer is a "trust fund," and that the tax-payer and the railroad company are both beneficiaries. *Des Moines & M. Ry. Co. v. Lowry*, 51 Iowa, 486. It is said that the language in that case is *dictum*, and not authority. However that may be, the question properly arises here, and we think the doctrine announced sound on principle. A reference to the law devolving upon the officers of the county the duty of collecting these taxes shows that neither the county nor the officers have any interest whatever in the funds so collected, but that the officers are mere agents to aid the township or municipality and the railroad company in carrying out their contracts. We have held that the law making counties liable for taxes illegally collected has no application in cases of this kind, where the funds have been paid over; and the holding rests upon this distinction of a trust or agency. In *Butler v. Board*, 46 Iowa, 326, this doctrine of trust or agency is inferentially, if not expressly, announced. The judge, in delivering the opinion in *Tallant v. City*

1. TAXES : illegal : payment : recovery : limitation of action.

2. — : in aid of railroads : county treasurer is trustee.

Eyerly v. Supervisors of Jasper County.

of *Burlington*, 39 Iowa, 543, said: "The city was not a mere trustee or agent by which the tax was collected for the benefit of a * * * public corporation or a person." It may be said that all officers of counties are agents, and wherein they hold funds they are in trust, which is undoubtedly true, but the liability of such agents or trustees depends upon the character of the agency or trust. We attach less importance to the name than to the true character, and yet the name aids the legal mind much to understand the relationship. With the relationship established, does it in any manner affect the operation of the statute of limitations? We think it should. *Beecher v. County of Clay*, 52 Iowa, 140, is cited by appellees with much apparent confidence, and we think it the strongest case in their favor. It was a *mandamus* proceeding to compel the board of supervisors to order the refunding of the taxes illegally levied. The taxes were paid in 1873, and the demand made upon the board to refund in June, 1878, and the action commenced thereafter. The court states the question in the case as follows: "Can the plaintiff, by neglecting to demand of the board an order for the refunding of the taxes, delay the running of the statute of limitations?" The opinion negatives the proposition, and takes for its support a quotation from *Prescott v. Gonser*, 34 Iowa, 175, which holds that the action of *mandamus* cannot be maintained until there has been a refusal to perform the act sought to be enforced, and that a party may not stop the running of the statute by neglecting to make the demand. It also uses this language: "It is certainly not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him, in order to perfect his remedy against another." It must be conceded that these holdings are based upon the theory that a party must not neglect to do that which of right he ought to do, and which if done would be of avail to him. Let us look at the particular facts in this case. At the time these taxes were paid a suit was pending between the parties in interest to test the

validity of this tax. These were the only parties having any interest in the money held by the treasurer. Suppose a demand had then been made for an order for the return of the money, and on refusal this suit had been instituted. Upon a mere suggestion of the fact, the court would postpone a hearing until a final determination of the suit between the parties in interest, and it would be reasonably expected that with such determination no further hearing would be necessary; and, if the court did allow it to proceed, it should not do it without the other party in interest being interpleaded, and the same issues would be involved on the two suits. This the law does not require.

The commencement of the suit against the railroad company was the commencement of a suit to recover this money, in its effect, and the law did not require the plaintiff to suppose that a disinterested party, whose only right to retain the money was to know where the law would place it, ever might refuse to surrender it. So far as the validity of the tax is concerned, the adjudication between the tax-payer and railroad company is conclusive. We may in reason say that, after the commencement of the suit against the company to test the validity of the tax, the right to successfully prosecute this suit was contingent upon that. Practically it must await the result. In principle it is not materially different from cases where one in good faith pays taxes, and the land is afterwards adjudged to belong to another. His right to recover the taxes so paid is contingent upon the suit which settles the title, and in such cases the statute does not run until the question of title is settled. *Goodnow v. Stryker*, 62 Iowa, 221; *Same v. Litchfield*, 63 Iowa, 275, and other cases cited. While in all respects these cases and the one at bar are not alike, the principle in this respect seems to be the same. The defendants, being entirely disinterested, and merely holding the money for the party entitled thereto, would be presumed to be willing to abide the result of the litigation between the

3. —: —:
 payment:
 subsequent
 decree of in-
 validity: re-
 covery: limi-
 tation of ac-
 tion.

Smith v. Kegley.

parties, and pay the money to the party adjudged entitled to it, and we think the law implies a promise to do so. Hence we think the statute of limitations did not commence to run before the final judgment in the suit against the company, if at that time. See *Hintrager v. Richter*, 76 Iowa, 406. With this holding the action is not barred, and the cause is reversed, and remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

SMITH V. KEGLEY.

Burden of Proof: INSTRUCTION AS TO: WHEN NOT REQUIRED. When there is no conflict in the evidence as to the only issue of fact involved, there can be no error in refusing to instruct as to the burden of proof. And, in this case, where the only issue was whether defendant had been employed by plaintiff for sixty-five or seventy-five dollars per month, and defendant testified that he told plaintiff that he would not work for less than seventy-five dollars, and that plaintiff told him to go on, and he would make it all right, and plaintiff testified, after giving his version of the transaction, that he would not swear that he had not made the statement attributed to him by defendant, *held* that the issue was established for defendant without conflict.

Appeal from Story District Court.—HON. JOHN L. STEVENS, Judge.

FILED, MAY 16, 1889.

THIS is an action to recover one hundred and ten dollars, which the plaintiff alleges the defendant received as an employe of plaintiff, and converted to his own use. The defendant answered by a general denial. He admitted that he was a traveling salesman for plaintiff during the year 1887, at a salary of seventy-five dollars per month, and that he only had a sufficient amount of plaintiff's money in his hands to compensate him for his services. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

Geo. A. Underwood, for appellant.

J. F. Martin, for appellee.

ROTHROCK, J.—It is conceded that the defendant was in the employment of the plaintiff as a traveling salesman for the year 1886, at a salary of sixty-five dollars per month. Some days before January 1, 1887, the defendant inquired of the plaintiff what he intended to pay defendant as wages for the year 1887. This controversy between the parties arose over what occurred at that interview. The parties were the only witnesses examined upon the trial, and the question the jury was required to determine was whether the wages of 1887 were to be sixty-five dollars or seventy-five dollars per month. If the contract was for sixty-five dollars per month, the defendant was indebted to the plaintiff in the sum of one hundred and ten dollars, and if the compensation was to be seventy-five dollars per month the plaintiff had no valid claim upon the defendant. The plaintiff requested the court to instruct the jury as follows: “The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant has in his possession money belonging to him, as alleged in the petition; but when this is proved or admitted by defendant the burden of proof is on defendant to prove by a preponderance of the evidence the contract which he alleges in his answer, that his wages were to be seventy-five dollars per month for the time employed, in order to justify him in retaining the one hundred and ten dollars sued for.” The court refused to give this instruction, and charged the jury, in substance, that under the issues joined the burden of proof was on the plaintiff to establish the allegations of his petition not admitted, by a preponderance of the evidence. It is claimed that these rulings of the court were erroneous. It will be observed that, according to the rule of the instruction which was refused, the plaintiff should have assumed the burden of proof in the opening of the case, and then, after proof or admission

Smith v. Kegley.

that the defendant received the money, the burden was shifted on the defendant to show by the contract that he was to receive seventy-five dollars a month. It is doubtful whether, under the pleadings, there ought to have been any change of the burden of proof. There may be issues in cases where this is required, but we do not determine whether, under the pleadings in the case, the court should have adopted that rule, because, under the evidence, it was not a practical question in the case. The defendant testified as to the interview above mentioned as follows: "I told him I would not work for the same wages I had got in 1886; that I could do better. He figured a little and says: 'You see you have not earned me more than that;' and I said that was immaterial; that I would work where I could do the best; that I was offered seventy-five dollars by other parties. We talked a little, and he got up and started out, saying: 'You go on and we will make that all right.' That is all the talk we had in regard to my year's salary." The plaintiff, in his examination in chief, claimed that the defendant demanded more wages, but that he did not agree to pay more, unless he (defendant) sold goods enough to justify the payment of a higher salary, and that defendant did not make him anything during the year, but, on the contrary, there was a loss of five hundred dollars on his employment. The plaintiff was called in rebuttal, and it appears from appellee's abstract that he then testified as follows: "Kegley told me he was offered more than sixty-five dollars a month. I am unwilling to swear that I did not tell him to go on and work, and I would make it all right. I can't answer 'Yes' or 'No' to that question." This statement of evidence in appellee's abstract is not denied, and it must be accepted as true. It is apparent, then, that there was no real conflict in the evidence. The plaintiff does not really contradict the testimony of the defendant, and there was no room for the application of any rule as to the burden of proof. The jury would not, under the evidence, have been warranted in finding for the plaintiff.

AFFIRMED.

77	478
88	705
77	478
100	456

COX v. THE BURLINGTON AND WESTERN RAILWAY COMPANY.

1. **Railroads: INJURY TO MARE AT CATTLE-GUARD: EVIDENCE TO SUPPORT VERDICT.** Plaintiff sues for the value of a mare which was found lying about six feet from a cattle-guard on defendant's road, so seriously injured that she died the next day. The jury found that she was struck by a train, or frightened by an engine so that she ran into the cattle-guard, and so was injured. The evidence to sustain such finding was all circumstantial (see opinion), while defendant's employes testified that no such accident occurred. *Held* that, while the preponderance of the evidence, as it appears in print, seems to be against the finding of the jury, yet this court cannot say that the jury was not warranted in so finding, nor that the trial judge erred in overruling a motion for a new trial; since they saw and heard the witnesses, and were better able to judge of the weight that should be given to their testimony.
2. **Verdict: FOR MORE THAN CLAIMED: PLEADING AND PRACTICE.** Where only one hundred and forty dollars was claimed, a verdict for one hundred and fifty dollars was not authorized; but when defendant moved to reduce the verdict to one hundred and forty dollars and interest, and the interest was about ten dollars, judgment should have been entered for one hundred and fifty dollars; and it was error to allow plaintiff, after verdict, to file an amendment to his petition alleging his damages to be one hundred and fifty dollars, instead of one hundred and forty dollars, the amount originally claimed.

Appeal from Mahaska District Court.—HON. DAVID RYAN, Judge.

FILED, MAY 16, 1889.

THIS is an action at law to recover damages for the alleged killing of a mare, the property of plaintiff, by one of the trains of the defendant, while operating its railroad. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Geo. W. Lafferty, W. L. Cooper and W. D. Eaton,
for appellant.

Bolton & McCoy, for appellee.

ROTHROCK, J.—I. On the first day of December, 1886, the plaintiff's mare was turned into an enclosure through which the defendant's railroad was constructed and in operation. The railroad right of way was not fenced. On the next day the animal was found in the field, some distance from the railroad track, with her left hind leg broken, a bruise behind her left fore leg, and a bruise on her head. She was taken to plaintiff's barn, and died on the next day. The ground was covered with snow at the time, to the depth of about one foot. An investigation was at once made to ascertain the cause of the injury. She was tracked back to a point opposite a cattle-guard in the railroad, where it was discovered that she had either fallen or been thrown by one of the defendant's locomotive engines. It is claimed by the plaintiff that the mare was struck by an engine approaching the cattle-guard and carried along to the guard, and thrown off to one side. The defendant denies that the animal was struck by a train, or that she was frightened by an engine and ran into the cattle-guard, and strenuously contends that the evidence was insufficient to authorize a finding by the jury that the accident was caused by the operation of its road. This is the ground upon which a reversal of the judgment is demanded. It is not to be denied that a careful examination of all the evidence leaves the mind in doubt upon the question. The jury were authorized to find from the evidence that the injured leg was not merely fractured. All of the witnesses who examined it stated that it was ground up between the pastern joint and the knee. One witness described it in this language: "The left hind leg, between the pastern and knee, was all mashed up. I just took hold of the foot, and could turn it round any way. It was just ground up." There are but two causes to which the injuries can, with any fairness, be attributed,—one, that the animal was struck by a train; and the other, that she ran into the cattle-guard. The manner in which the leg was injured is not

1. RAILROADS :
injury to mare
at cattle-
guard : evi-
dence to sup-
port verdict.

consistent with the theory that it was caused by jumping into the cattle-guard. There is a conflict in the evidence as to the distance from the cattle-guard at which the imprint of the animal in the snow was found. All of the witnesses agree that it was nearly opposite the end of the guard, but they differ in their estimate of the distance. The track and cattle-guard were elevated slightly above the ground on each side. We think the jury was warranted in finding that the bed made by the animal in the snow was six feet distant from the cattle-guard. Between that point and the guard there were no tracks or marks. The absence of tracks or marks, or other evidence of a struggle of the animal at the guard, would indicate rather that she was pitched or thrown into the snow by an engine than that she fell into the guard and extricated herself. The plaintiff testified as a witness in his own behalf, and stated that he saw the tracks of the animal at some distance back of the cattle-guard, and that he followed the tracks between the rails up to the guard. This fact is inconsistent with the theory that the mare was struck by an engine and carried, or dragged, and thrown off at the point opposite to the culvert. Then, again, some three witnesses testified that there were tufts of hair found along inside one of the rails of the road for some distance back from the culvert, and that in color the hair corresponded with the color of the hair on the mare's legs. As there were other horses in the field, this would indicate that the tracks leading up to the culvert were not made by the mare in question. Hair was found on the cattle-guards. This last fact does not in our opinion necessarily establish the theory of defendant that the mare jumped into the cattle-guard. There remains the unaccountable fact that there was no evidence of a struggle at the guard,—no marks at that point, except the hair on the guard; and it is difficult to account for the hair being found on the inside of the rail approaching the cattle-guard. The theory of the defendant, that another engine, which went along the

road afterwards, in the opposite direction, picked up the hair and distributed it along the rail, does not strike us as plausible.

There are other facts in the case, of minor importance, which we need not set out nor discuss. Our conclusion is that the jury were authorized in finding that the injury occurred by reason of contact with a train in some way. If the injury was inflicted by a train, it was done in the night. The engineer and fireman of the train which passed over the road both testify positively that the train did not strike an animal at or near the cattle-guard, and that no animal was frightened by the engine and ran into the guard. Defendant insists that, with this positive evidence, the jury should have found for the defendant. As we look at the cold facts of the case upon paper, we are free to say that if we were trying it anew, and determining it from the preponderance of the evidence, we would promptly reverse the judgment. But we cannot put ourselves in the place of the jury and the learned judge of the court below. Every witness who comes upon the stand has a presence, so to speak. There is the manner, the demeanor, the hesitancy or fluency with which he testifies, and, above all, the expression of face or countenance, which often produce a conviction that he is truthful, or, on the contrary, causes doubt as to his veracity. All this evidence, and all these aids to the ascertainment of the truth, passed the scrutiny of the learned district judge in a motion to instruct for the defendant, and in a motion for a new trial, and we cannot say that he erred.

II. The plaintiff alleged in the petition that the mare that was injured was of the value of one hundred and forty dollars. Double damages were claimed, under the statute, but there was no proof of notice having been served as required by law, and the court instructed the jury that double damages could not be allowed. The jury were not instructed to add interest to the value

2. VERDICT: for more than claimed: pleading and practice.

Cox v. The Burlington & W. Ry. Co.

of the animal. The verdict was for one hundred and fifty dollars. It was returned on the fourteenth day of March, 1888. Two days afterwards the plaintiff moved the court to add to the verdict returned interest at six per cent. per annum from the time of the injury. This motion was sustained, and judgment was rendered for \$161.55. On the same day defendant moved the court to reduce the verdict to one hundred and forty dollars, and that judgment be rendered for that amount, with interest from the time plaintiff's claim became due. This motion was overruled. The plaintiff on the same day filed an amendment to his petition, in which he alleged that said mare was worth one hundred and fifty dollars instead of one hundred and forty dollars, as alleged in the original petition. Objections to this amendment were overruled. The defendant now asks that the judgment be reduced to one hundred and fifty dollars. These subsequent proceedings were certainly very irregular. The plaintiff was not entitled to a verdict for more than one hundred and forty dollars. But defendant conceded by its motion that he was entitled to interest on that amount. This would make about one hundred and fifty dollars. The judgment should have been entered for that amount. The filing of an amendment to the petition after verdict, increasing the amount claimed, ought not to have been allowed. The judgment will be modified by reducing the same to one hundred and forty dollars, which will draw interest at six per cent. per annum from March 14, 1888.

MODIFIED AND AFFIRMED.

SCOTT V. ROGERS *et al.*

Notice: LIS PENDENS: ACTION FOR DIVORCE AND ALIMONY. The filing of a petition for divorce, in which it is alleged that the defendant has real estate, and asking for judgment for alimony, and that it be made a special lien on defendant's real estate, does not create a lien on the real estate, nor give notice of an interest therein, under section 2628 of the Code; but *held* that a mortgage made by defendant on his real estate after the filing of such petition, and recorded before judgment for alimony is rendered in such case, is a lien superior to the judgment.

Appeal from Muscatine District Court.—HON. W. F. BRANNAN, Judge.

FILED, MAY 17, 1889.

THIS is an action for the foreclosure of a mortgage executed by Peter Rogers to Scott & Clute, on the fifteenth day of February, 1886, upon certain real estate in Muscatine county. The mortgage was duly filed for record on the sixteenth day of February, 1886. Prior thereto, to-wit, January 10, 1886, Catherine Rogers filed her petition in the circuit court of said county, asking that she be divorced from said Peter Rogers, and alleging that he had real and personal property, and asking for one thousand dollars alimony, and that the same be made a special lien upon his real property, and for temporary alimony. After the making of the mortgage, June 12, 1886, Catherine Rogers filed an amendment to her petition, describing the several parcels of real estate owned by Peter Rogers, part of which was in Poweshiek county, and part in Muscatine county, including that in question. On June 12, 1886, a judgment was entered against Peter Rogers for one hundred dollars temporary alimony, and on February 28, 1887, on final hearing, a decree was entered granting a divorce to Catherine Rogers, and giving her judgment against Peter Rogers for one hundred and fifty dollars permanent alimony.

Scott v. Rogers.

Executions were issued on these judgments, and levied upon the lot in question, with others, and sold to the defendants Richman, Burke & Russell. The mortgage to Scott & Clute was not signed by Catherine Rogers, and was given by Peter Rogers to secure Scott & Clute for services rendered and to be rendered as his attorneys in defending against said petition for divorce.

J. Carskaddan and Scott & Clute, for appellant.

Richman, Burke & Russell, pro se.

GIVEN, C. J.—I. The validity of the plaintiff's mortgage is not questioned, and herein this case differs from *Sesterhen v. Sesterhen*, 60 Iowa, 301. This mortgage having been executed and recorded prior to the rendering of either of the judgments for alimony, it is entitled to priority, unless the petition, upon which these judgments were rendered, comes within the provisions of section 2628 of the Code, which provides: "When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title, if the real property affected be situated within the county where the petition is filed." In *O'Brien v. Putney*, 55 Iowa, 292, this court cited approvingly section 196 in Freeman on Judgments, wherein it said: "In order to bring the doctrine of *lis pendens* into effect, it is indispensable that the litigation should be about some specific thing which must necessarily be affected by the termination of the suit. It does not apply to an action for divorce and for alimony to be paid out of the husband's estate, because such a suit does not apply to any specified part of the husband's estate, real or personal. The judgment which may be obtained may, from the docketing thereof, constitute a lien on certain property, but in this, as well as in all other respects, it no more constitutes a *lis pendens*, or a claim to particular estate, than a suit upon a promissory note, or any other sufficient cause of

The State v. Matheison.

action.” See, also, Benn. Lis Pendens, sec. 94, note 3, and section 99, note 1, and section 219, and note ; also Wade, Notice, sec. 352, and cases cited. This doctrine is emphasized by the provisions of our Code for the granting of attachments in actions for divorce, and for granting injunctions. Under the facts of the case and the authorities cited, we are of opinion that the plaintiff’s petition, as filed before the execution of the mortgage, did not constitute a *lis pendens*, and that the mortgage is superior to either of the judgments.

REVERSED.

THE STATE V. MATHEISON *et al.*

Liquor Nuisance: INJUNCTION: EVIDENCE. Action to enjoin a liquor nuisance. The evidence establishes that defendant kept a public eating-house and restaurant; that he kept intoxicating liquors; that he paid a special tax to the United States as a liquor dealer; and that the reputation of his place was that of a place where intoxicants were kept and sold. Adding to the presumptions which arise from these facts, under the statute, the testimony tending to show actual sales (for which see opinion), *held* that the state was entitled to an injunction and a judgment for costs, including an attorney’s fee.

Appeal from Johnson District Court.—HON. S. H. FAIRALL, Judge.

FILED, MAY 17, 1889.

ACTION in equity, under chapter 66, Acts of Twenty-first General Assembly, to enjoin a nuisance. There is nothing on file in this court but the appellant’s abstract and argument. The abstract shows the pleadings and testimony, and that the court “rendered judgment therein, dismissing the plaintiff’s bill, and rendered judgment against plaintiff for costs, to which judgment and ruling the plaintiff then and there excepted.” Also, that on November 23, 1888, a notice of appeal was duly served on the clerk of the district court and the attorney for defendants.

Milton Remley, for appellant.

Geo. A. Ewing, for appellees.

GIVEN, C. J.—I. The only question to be determined on this appeal is whether under the testimony there should not be a decree for permanent injunction against the defendants, and judgment for costs, including an attorney's fee. Ten witnesses were examined in behalf of the state. One testified that defendant Charles Matheison had paid an internal revenue tax as a retail liquor dealer at Lone Tree, Iowa, April 30, 1887, and that fifty dollars to sixty dollars would be a reasonable attorney's fee for prosecuting this case. Another testified that on notice the district attorney refused to prosecute this case, and another that "the reputation of Matheison's place in the community is that it is a place where they sell something stronger than cider or beer—something calculated to intoxicate." The other seven were called to show the keeping for sale and selling intoxicating liquors, and testified with a reluctance so frequently manifest on such examinations. The testimony of four of them shows very satisfactorily that at different times the defendant Charles Matheison had furnished each of them with whiskey in his place. Neither testified directly to payment; but their statements leave no doubt but that it was furnished for a consideration, and under the circumstances show an intention to evade the provisions of the statute. Two testify to the purchase of cider. The defendant testified that he did not sell sweet apple cider, but champagne and peach cider. The other witness for the state testified to the purchase of "zodone," which "I said looked like whiskey, I supposed was whiskey. I would not say it was poor whiskey, exactly. I do not know what it was. It never had any effect on me. If you would drink enough it might. I do not think it was part whiskey. I got it because I wanted something to stimulate me." There was testimony as to the sale of

The State v. Matheison.

“hot shot” and other drinks. The only reference in the testimony to the defendant Mrs. Charles Matheison is in the testimony of De Forest, that when he called for whiskey, Charles Matheison said he did not keep whiskey for sale, but his wife had some that she kept for her private use, and that he went and got the whiskey, and handed it to them over the counter. The defendant testified that he never sold, or kept for sale, intoxicating liquors in his place; that the drinks he sold were not intoxicating; that he took out a government license, as his neighbors were troubling him, and it was cheaper to pay twenty-five dollars to the government than to run the risk. He also testified as to the manufacturers from whom he got the drinks that he sold, and that none of them were intoxicating. John Reed, son-in-law of the defendant, testified that he was about the place a great deal, and never knew of the defendant’s keeping or selling any intoxicating liquors, and that “hot shot,” “zodone,” and other drinks kept by the defendant, were not intoxicating.

It is evident from this testimony that the defendant kept a public eating-house and restaurant; that he kept intoxicating liquors; that he paid special tax to the United States as a liquor dealer; and that the reputation of his place was that of a place where intoxicants were kept and sold. Adding to the presumptions that arise under the statute from these facts the testimony tending to show actual sales, we cannot doubt that the allegations of the petition were fully established, and that an injunction should issue. We think that fifty dollars was a reasonable attorney’s fee for prosecuting the case in the district court, and that an additional \$—— should be allowed for prosecuting this appeal. The decree of the district court is affirmed as to the defendant Mrs. Charles Matheison and reversed as to the defendant Charles Matheison. A decree should be entered against Charles Matheison, granting an injunction as prayed, and judgment for costs, including an attorney’s fee.

TOERRING V. LAMP.

1. **Estates of Decedents: APPROPRIATION OF RENTS OF REAL ESTATE TO PAY DEBTS: CODE, SEC. 2403.** Under the provisions of section 2403 of the Code, an executor or administrator, under the order and direction of the court, may apply the rents and profits of the decedent's real estate, accruing after his death, to the payment of debts and claims against the estate, in case the personal assets are insufficient; and the right to so take and apply rents and profits is not restricted to real property, possession of which is taken by the executor under section 2402 because there is no heir or devisee present and competent to take it. But before an order is made to so take and apply rents and profits, the heirs or devisees in possession should be made parties, and it should be made to appear that there is a necessity for such appropriation by reason of the insufficiency of the personal assets. (See opinion for a full discussion of the question by ROBINSON, J.)
2. ——— : **COLLECTION OF ASSETS: OFFSETTING CLAIMS AGAINST DECEDENT.** The deceased, before his death, became indebted to a corporation for shares of stock. The corporation rented real estate of the decedent, and the administrator in this action seeks to collect rent accrued since decedent's death. *Held* that the corporation could not offset its claim for stock, but that it must pay the rent in full, and file its claim for the stock, and accept therefor a due proportion of the funds available for the payment of the class of claims to which it belongs, in case there is not enough to pay such claims in full. (See opinion for citations.)

Appeal from Scott District Court.—HON. CHARLES M. WATERMAN, Judge.

FILED, MAY 17, 1889.

PLAINTIFF seeks to have established as preferred certain claims for rent. The defendant asks to have certain indebtedness allowed as a set-off against the claim of plaintiff. Plaintiff's claims were established, but the set-off asked was not allowed. Defendant appeals.

Wm. K. White, for appellant.

Nath. French, for appellee.

ROBINSON, J.—There is no controversy as to the material facts of this case. August Wamebold died intestate on the twentieth day of August, 1887, and on

77	488
82	455
77	488
88	496
77	488
115	650
77	488
122	626

Toerring v. Lamp.

the fifteenth day of October, 1887, Christian Toerring was duly appointed and qualified as administrator of his estate. In his lifetime Wamebold was the owner of the real estate involved in this action, and executed a lease thereof for the term of twenty years from the first day of March, 1875. By the terms of the lease the lessor was to receive an annual rental of nine hundred and fifty dollars, in equal quarterly payments, on the last days of May, August, November and February, of each year. The Globe Plow-Works, a corporation, became the assignee of the lease about January, 1887, and responsible for the payment of rents to accrue thereunder. On the fifteenth day of October, 1887, the Globe Plow-Works made an assignment for the benefit of creditors, and Christian Lamp was duly appointed and qualified as its assignee. When Wamebold died he was owing to the Globe Plow-Works, on shares of its capital stock which he held, a balance of sixteen hundred dollars. His estate is insolvent, and the real property which forms a part of it will have to be sold for the payment of debts. An order was made by the proper court, with the consent of the widow and heirs of decedent, directing plaintiff to collect the rents in controversy. Plaintiff seeks to have the rent which was to accrue on the last day of November, 1887, and thereafter, established as preferred claims against certain property held by defendant. The defendant asks to have the indebtedness of decedent for stock allowed as a set-off against the rent. Other relief was originally asked by the parties, but by stipulation filed in this court it is shown that the allowance of the set-off asked by defendant is the only matter now in controversy.

I. In the absence of a statute to the contrary, the real property of an intestate descends at once to his heirs and the personal property to his administrator. *Kinsell v. Billings*, 35 Iowa, 156; 5 Amer. & Eng. Cyclop. Law, tit. "Debts of Decedents," 262, notes and authorities cited therein; 7 Amer. & Eng.

1. ESTATES of decedents: appropriation of rents of real estate to pay debts: Code, sec. 2403.

Toerring v. Lamp.

Cyclop. Law, tit. "Executors and Administrators," 270, and notes. Rents not accrued pass with an unconditional conveyance of the real estate from which they are to issue. *Winn v. Murehead*, 52 Iowa, 64; *Townsend v. Isenberger*, 45 Iowa, 672. They would therefore pass to the heirs of the intestate. Accrued rent will not pass to the grantee of the real estate from which it becomes due, unless so specially provided by stipulation. *Van Driel v. Rosierz*, 26 Iowa, 576. It would therefore pass to the administrator of the intestate. *Crawford v. Ginn*, 35 Iowa, 550. The heirs would acquire the title to unaccrued rents for the reason that they are so far dependent upon the real estate from which they are to issue as to be treated as a part of it. The provisions of the Code relevant to the question under consideration are as follows: "Sec. 2386. The court, on the application of the executor, shall from time to time direct the sale of such portions of the personal effects * * * as are necessary to pay off the debts and charges upon the estate. Sec. 2387. If the personal effects are found inadequate to satisfy such debts and charges, a sufficient portion of the real estate may be ordered to be sold for that purpose. Sec. 2388. Application for that purpose can be made only after a full statement of all the claims against the estate, and after rendering a full account of the disposition made of the personal estate." "Sec. 2402. If there be no heir or devisee present and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate, and demand and receive the rents and profits thereof, and do all other acts relating thereto which may be for the benefit of the persons entitled to such real estate. Sec. 2403. Such executor or administrator, under the order and direction of the court, may apply the profits of such real estate to the payment of taxes and of debts and claims against the estate of the deceased, in case the personal assets are insufficient. Sec. 2404. Such executor or administrator shall account to such heirs or devisees for the rents, profits or use of such real estate, deducting therefrom the payments

Toerring v. Lamp.

made under the preceding section, together with a reasonable compensation for his own services, to be fixed by the court.”

Before an administrator can recover rents of real estate which accrue after the death of the intestate, he must show that there is no heir present and competent to take possession of the premises. *Shawhan v. Long*, 26 Iowa, 492. See, also, *Foteaux v. Lepage*, 6 Iowa, 130; *Stringham v. Brown*, 7 Iowa, 38; *Crane v. Guthrie*, 47 Iowa, 545; *Gray v. Meyers*, 45 Iowa, 160; *Hodgin v. Toler*, 70 Iowa, 25. The sections of the Code which we have quoted have changed to some extent the rule of the common law, and were designed to enable the administrator to subject the real property of the decedent, so far as it is required and is available, to the payment of his debts and other charges against his estate. It is the policy of the law to require the payment of all debts of a decedent, and to devote to that purpose so much of his property not exempt as is necessary, even though it should result in depriving his heirs and devisees of all benefit from his estate. This is to be done by means provided by statute, and actions by creditors against heirs, to recover the value of real estate they may have received, are avoided. Section 2402 of the Code only authorizes the executor to take possession of the real property of the decedent when no heir or devisee is present and competent to take possession. But section 2403 authorizes the executor, “under the order and direction of the court,” to apply the profits of such real estate to the payment of debts and other claims against the estate. That section, it is clear, authorizes the appropriation of rents and profits of real estate of which the executor has taken possession to the payment of the liabilities specified; but is such appropriation to be restricted to the profits issuing from real property, possession of which is taken by the executor, because there is no heir or devisee present and competent to take it?

It must be conceded that there is no more reason for or justice in using the profits for the payment of such

Toerring v. Lamp.

liabilities in one case than there is in the other. The words, "such real estate," of section 2403, refer as directly and naturally to "the real estate left by such decedent" of the preceding section, as they do to the real estate of which the executor shall take possession. To give them that construction would be in harmony with the policy of our law, and would make its various provisions, to which we have referred, consistent with each other. Before the order contemplated by section 2403 should be made, the heirs or devisees in possession of the real estate would have to be made parties to the proceeding to obtain it. But when that has been done, and the necessity for the appropriation has been shown, we think it can be ordered. In this case it seems to be conceded that the rents in question will be required to pay the liabilities of the estate of Wamebold. They are to be collected by plaintiff pursuant to an order of court, made with the consent of the widow and heirs of the deceased. It may be that such consent was given with the understanding that no right to them was thereby waived, and that their liability to be taken by plaintiff was to be thereafter determined. But under the admitted facts of the case the rents are not exempt, and will have to be retained by plaintiff to discharge the debts of the estate. There are numerous decisions which hold, in effect, that rents which accrue between the death of the owner of realty and the date of its sale to satisfy debts cannot be taken by the administrator, but, so far as we are aware, none of them were rendered under statutes similar to those of Iowa.

II. Is defendant entitled to have his claim of sixteen hundred dollars for balance due on stock allowed as a set-off against the rents for which this action was brought? It did not arise out of the transaction set out in the petition. It is not of the nature of a preferred claim. If it had been filed with plaintiff as a demand against the estate of decedent, defendant could have recovered thereon only a due proportion of the funds available for the payment of the class of claims to which it would

2. —: collection of assets: offsetting claims against decedent.

Rockafellow v. Board of Equalization.

have belonged. He would have been entitled to offset his claim against his liabilities to decedent which had accrued at the time of his death, but the rents in question accrued wholly after Wamebold's death. They have become a part of the general assets of the estate, and can be used by plaintiff only in the manner and for the purposes authorized by statute. The preference asked by defendant is not permitted. Code, secs. 2418-2420. We are of the opinion that the claim of defendant cannot be used to reduce the amount of rents plaintiff is entitled to recover. See *Eldredge v. Bell*, 64 Iowa, 126; *Cook v. Lovell*, 11 Iowa, 81; *Nichols v. Dayton*, 34 Conn. 66; *Fry v. Evans*, 8 Wend. 530; *Dayhuff v. Dayhuff's Adm'r*, 27 Ind. 158; *Hendrix v. Hendrix*, 65 Ind. 329; *Colby v. Colby*, 2 N. H. 419; *Harris v. Taylor*, 53 Conn. 500; 2 Atl. Rep. 749; Wat. Set-off, sec. 181. We conclude that the judgment of the district court was correct, so far as we are called upon to consider it, and it is therefore

AFFIRMED.

ROCKAFELLOW V. BOARD OF EQUALIZATION.

Taxes : EQUALIZATION : PROCEEDINGS OF BOARD : JURISDICTION. Where the board of equalization, at its first meeting, "changed" the assessment of plaintiff upon personal property, moneys and credits from fifteen dollars to fifty-three hundred and thirty-four dollars, and the assessment was then changed in the assessment book accordingly, and the board then adjourned for twelve days, and on the second day after adjournment the clerk of the board posted notices as provided by statute, showing the action of the board in raising certain assessments, including that of plaintiff, and advising all parties that the board would, on the day to which it had adjourned, naming it, meet "for the purpose of hearing grievances why the within assessments should not be raised," and plaintiff saw this notice, and had such knowledge as a full inspection thereof would convey, but he failed to appear on the day named to object to the raising of his assessment, and the assessment, without further action, was left as changed, *held* that plaintiff could not complain thereof, on the ground that the board had no right or authority to change the assessment at the first meeting, nor until

Rockafellow v. Board of Equalization.

after opportunity had been given to make objections thereto; for, while the statute (Laws of 1880, chap. 9, sec. 8) contemplates only a preliminary investigation and not final action at the first meeting, the action in this case was not designed to and did not cut off plaintiff's right to object and to have a full hearing before final action was taken; and the fact that the entry was made at the first meeting was at best but an irregularity not affecting a substantial right, and not avoiding the proceeding.

Appeal from Cass District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, MAY 17, 1889.

CERTIORARI to the defendants, as a board of equalization, to review their proceedings in assessing plaintiff's property. Judgment for defendants, and plaintiff appeals.

Rockafellow & Scott and L. L. De Lano, for appellant.

John W. Scott, for appellees.

GRANGER, J.—The following are the facts as found by the court below, and undisputed:

“*First.* Plaintiff was assessed by the city assessor of said city of Atlantic, for the year 1887, at fifteen dollars.

“*Second.* April 14, 1887, being the first Monday of said month, the defendant board of equalization of said city of Atlantic met for the purpose of equalizing the assessments, and continued in session from day to day up to and including April 13.

“*Third.* On April 13, the board, having determined that plaintiff's assessment upon personal property moneys and credits should be increased from fifteen dollars to fifty-three hundred and thirty-four dollars, made, among others, the following record of their proceedings: ‘On motion the following assessments were then changed: Rockafellow, J. B., from fifteen dollars to fifty-three hundred and thirty-four dollars,’—and the assessment of plaintiff was then changed on the assessor's book upon

Rockafellow v. Board of Equalization.

personal property and moneys and credits from fifteen dollars to fifty-three hundred and thirty-four dollars; and the board, having completed its work of equalization, adjourned to meet at nine o'clock, April 25, 1887, for the purpose of hearing grievances why the said assessments should not be raised as indicated by the said action.

“Fourth. On April 15, 1887, the city clerk posted up in the usual place of meeting of the board, and in the post-office in said city, a notice, as follows: ‘Council Chamber, City of Atlantic, April 13, 1887. The board of equalization met pursuant to adjournment. Present, the members. The equalization of assessments having been completed, on motion the board of equalization adjourned to meet at nine o'clock, April 25, 1887, for the purpose of hearing grievances why the within assessments should not be raised.’ Following this, and posted with it, was an alphabetical list of the names of the persons whose assessments the board had determined should be raised, and among other names, under the heading of ‘Personal Property, Moneys and Credits,’ and in proper alphabetical order, was the following: ‘Rockafellow, J. B., from fifteen dollars to fifty-three hundred and thirty-four dollars.’

“Fifth. The plaintiff saw and inspected this list, and the notice accompanying it, and had such knowledge as a full inspection thereof would convey prior to April 25, 1887, but he had no other notice, nor was any other or different notice given than that described in paragraph 4 hereof, and the plaintiff did not at any time appear before the board of equalization for any purpose connected with the equalization of his assessment.

“Sixth. The board of equalization met at their usual place of meeting, April 25, 1887, pursuant to their former adjournment, for the purpose of hearing grievances respecting the assessments contained in the list posted up, and did hear fully all the parties who appeared for that purpose, and made such changes and such further orders in individual cases as the showing made in each case, in the opinion of the board, justified. But

Rockafellow v. Board of Equalization.

the individual cases in which no appearance or complaint was made were left as they had been fixed at the prior meeting, and without further order being made respecting them at this time; and, the plaintiff not appearing, and no complaint being made respecting the increase in his assessment, it was by the board left as it had been fixed at the previous meeting, and without any further action respecting it on this day. The said board, having first heard and acted upon all the grievances and complaints made before it, adjourned finally on April 25, 1887."

We understand the only contention by appellant to be that the action of the board of equalization, in raising his assessment, was without jurisdiction, and hence void; that, if the board had jurisdiction to act, his remedy for error therein would be by appeal. If void for want of jurisdiction, it is, of course, a nullity, and this a proper remedy.

The particular facts upon which the want of jurisdiction is urged should be well in mind for the proper consideration of the case. These facts are that the board, on the thirteenth of April, determined that the plaintiff's assessment should be raised from fifteen dollars (as returned by the assessor) to fifty-three hundred and thirty-four dollars, and the assessment was thus changed on the assessor's book. The board then adjourned to meet April 25, for the purpose of hearing any grievances on account of the change. Notice was given as provided in such proceedings, when regular, which was seen by the plaintiff. No appearance was made by him, and the assessment, without further action, was left as changed on April 13. The point as urged in argument is that the board had no right to make the change in the assessment on the thirteenth; that it could only then decide what assessments should in their opinion be changed, and then make the change, if at all, at the adjourned meeting, after notice, as provided by law. The following is the statute governing such proceedings (chapter 109, Laws, 1880, sec. 3): "At the first meeting of the board of equalization of any

Rockafellow v. Board of Equalization.

township, town or city, they shall decide what assessment should in their opinion be raised, and make an alphabetical list of names of the individuals whose assessment it is proposed to raise, and post a copy of the same in a conspicuous place in the office or place of meeting of said board, and also in each post-office located in said township, town or city; and the board shall, if in their opinion some assessments should be raised, hold an adjourned meeting, with at least one week intervening after posting of said notices, before final action thereon, which notices shall state the time and place of holding such adjourned meeting." The law evidently does not contemplate that the board shall, before notice, do more than merely consider and determine what assessments should in their opinion be raised, and then give notice and an opportunity for hearing before the assessment is actually raised. The law does evidently contemplate some investigation or inquiry before notice as to a necessity for raising the assessment, for before notice it must reach an opinion that it should be done. It would be unreasonable to expect the board to reach such an opinion except by an investigation as to the facts, and hence it is not the law that a party is entitled to notice before such an investigation as would justify a *prima-facie* conclusion against him; but, when such a conclusion is reached, it is a basis for further action, and a notice must then be given with a view to the parties being heard and final action had. Now, in this case, the only departure from the prescribed form is that the board, in its preliminary investigation, having found that the assessment should be raised, fixed the amount and caused it to be entered of record, not as a finality in their proceedings, but to be further considered after notice to the plaintiff, and such a finding to be then made as the facts would justify. The case of *Henkle v. Town of Keota*, 68 Iowa, 334, is urged as authority against jurisdiction in this case. A reference to the facts will show a clear distinction. By turning to the statement of facts in that case it appears that the

Anderson v. Wyant.

board, on the sixteenth of April, made the assessments; that on the seventeenth "notices were posted up at the proper places, showing the assessments, the amount thereof, and the description of the property, as ordered by the board." Then, turning to the language of the opinion, on page 341, we have this: "The only notice given was after the board had increased the assessment; that is, after the entry of the judgment, notice of this fact was given." The distinction is surely obvious. In that case there was no notice of a time or place to be heard, but a notice that final judgment was entered. In this case there was no final judgment or conclusion entered, but only a conclusion upon a preliminary inquiry with notice of time and place to show cause against such entry, and an unquestioned purpose, on final hearing, to know the facts and conform the record or assessment thereto. This seems to be a compliance with the spirit and purpose of the law. The fact of the entry in the record at the time of the preliminary inquiry was at best a mere irregularity, not affecting a substantial right, and should not be allowed to avoid the proceeding. Equitably considered, it is a case in which the plaintiff had actual notice, and an opportunity to show the facts so well known to him, and free himself from any inequality in the public burdens. It is to be regretted if, relying on a technical rule of law, he has neglected to do so. The action of the board not being void for want of jurisdiction, the judgment is

AFFIRMED.

ANDERSON V. WYANT *et al.*

Real Estate: SALE OF: DEPOSIT AS SECURITY AGAINST JUDGMENT LIEN: WHO ENTITLED TO: REDEMPTION. W. procured title to land under a mortgage foreclosure to which plaintiff, the owner of a junior judgment, was not made a party. W. sold the land to N. and to secure N. against the junior judgment a portion of the purchase price was left as a deposit in the hands of K. Plaintiff in this action seeks to recover that sum in payment of his judgment. W., by a cross-bill, asks that plaintiff be required to redeem from the foreclosure sale, and that, on failure so to do, his right to redeem be barred. *Held—*

Anderson v. Wyant.

- (1) That, in the absence of proof that the money was left with K. for the plaintiff, or with directions to pay it on the judgment, plaintiff could not recover it.
- (2) That W. had a right, though he had sold the land, to maintain the cross-action to compel or bar a redemption, and that the relief asked in the cross-petition was properly granted.

Appeal from Black Hawk District Court.—HON. JOHN J. NEY, Judge.

FILED, MAY 17, 1889.

THIS action involves the right of the plaintiff to one hundred dollars, in the hands of Knapp & Co., defendants. The court held that the plaintiff was not entitled to the money, and he appeals. The facts appear in the opinion.

Hemenway & Grundy, for appellant.

F. C. Platt, for appellees.

ROTHROCK, J.—It appears from the record in the case that one William Morehouse was the owner of certain real estate in Bremer and Black Hawk counties. On the twentieth day of March, 1879, he executed a mortgage upon the said land to Margaret Wyant. On the twenty-eighth day of June, 1879, one Bieman recovered a judgement before a justice of the peace against said Morehead for fifty-two dollars debt and nineteen dollars costs. This judgment was filed in the office of the clerk of the district court of Black Hawk county on the second of July, 1879. The plaintiff became the owner of the same by assignment before it was filed in the clerk's office. Margaret Wyant foreclosed her mortgage, but did not make the plaintiff herein a party to the foreclosure suit. The property was sold under the foreclosure to Margaret Wyant, and on the eleventh day of February, 1886, she received a sheriff's deed therefor. On the twenty-sixth day of February, 1886, Margaret Wyant and the defendant W. W. Wyant, her husband,

sold and conveyed the land to the defendants F. Newman and Henry Newman. In making the transfer, the defendants J. T. Knapp & Co. acted as the agents of the parties. It was discovered that the right of the plaintiff as a judgment lien-holder had not been foreclosed, and one hundred dollars of the purchase money was returned and held by Knapp & Co. because of the judgment lien. The plaintiff claims that this money was to be paid by Knapp & Co. to the owner of the judgment. The defendant Margaret Wyant contends that there never was an agreement that the money was to be paid on the judgment, and that it was left in the hands of Knapp & Co. for the protection of Newman until the judgment lien could be removed. She filed a cross-bill in this action, requiring the plaintiff to redeem from the foreclosure sale, and that, on failure to do so, his right to redeem be barred. The court dismissed the plaintiff's petition, and entered a decree for the defendant upon the cross-bill.

I. The first question proper to be determined is, Was the plaintiff entitled to recover the deposit of one hundred dollars held by Knapp & Co.? It must be conceded that there was no right of recovery unless the money was placed in the possession of Knapp & Co. for the plaintiff, or with directions to pay the plaintiff the judgment. We think the court correctly held that the evidence did not warrant a judgment for the plaintiff. There is not one of the witnesses who testified unequivocally that the money was to be paid upon the judgment. J. T. Knapp, a member of the firm of Knapp & Co., testified that they held the one hundred dollars as a pledge that the judgment would be removed to have the title cleared; that Wyant "never agreed to pay it. Said he would have it removed." This is the only real explanation for the deposit of the money. The parties well understood that the judgment could be removed by an action to compel a redemption. If the deposit was intended to be applied on the judgment, it is not at all probable that it would still be in the hands of Knapp & Co. It is more likely the judgment would have been

Kilbourn v. Anderson.

paid at the time, and it is altogether unlikely that Wyant would pay the judgment until compelled to do so. The evidence shows an utter lack of privity between the parties who deposited the money and the plaintiff. They entered into no obligation by which they were under any promise legal or equitable to the plaintiff.

II. The plaintiff complains of the decree upon the cross-bill, because Wyant is not the owner of the land, and has no right to maintain the action; and it is claimed that the cross-action cannot be maintained because the defendants Newman, the present owners, cannot be compelled to accept a redemption. It is a sufficient answer to the last proposition to say that the defendants Newman were not made parties to the cross-action, and any rights they may have cannot be prejudiced by the decree, and we think that as Wyant is bound to make good title, and as her right to the deposit of one hundred dollars depends upon the extinction of the lien of the judgment, she may maintain the cross-action. In our opinion, the plaintiff had the right to redeem as a judgment lien-holder, and, as he makes no claim that he desires to do so, he is not in a position to complain of the decree on the cross-bill.

AFFIRMED.

KILBOURN V. ANDERSON.

77	501
90	14

1. **Estates of Decedents: CLAIM ON BOOK ACCOUNT: EVIDENCE.**
In an action to establish a claim on book account against the estate of a decedent, plaintiff's books were properly admitted in evidence, as well as his own testimony identifying the books and explaining charges by showing the dates thereof, and the like.
2. ——— : ——— : **JUDGMENT: PRESUMPTION AS TO CORRECTNESS.**
Where the account in such action contained items not proper to be established by the books, and others not properly chargeable to the estate, but the judgment did not exceed the amount of the items properly proved and owing by the estate, this court will presume that the improper items were rejected by the trial court.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

FILED, MAY 17, 1889.

PROCEEDING on the probate side of the court for the allowance of a claim against the estate of which defendant is the administrator. From an order allowing it defendant appeals.

E. A. Holcomb, for appellant.

C. J. Deacon, for appellee.

BECK, J.—I. Defendant is the administrator of the estate of John F. Sweet, deceased. Plaintiff's claim against the estate, which he seeks to enforce, is based upon an account which has been running for a great many years, the first item bearing date in 1859, and it is claimed that continuous transactions are shown by the account to 1886.

II. Defendant insists that there is no legal evidence tending to establish plaintiff's account accruing prior to 1861; that plaintiff was paid for the items in the account up to 1863; and that there was a break in the account, so as to destroy its continuity, in 1866. For these reasons he insists no allowance should be made for the items accruing before the last-named date. But we think we may disregard all items prior to 1868, and, starting with a balance shown to be due at that date, we will find that the evidence establishes with reasonable certainty an indebtedness on the part of the estate to plaintiff equal to or exceeding the amount allowed by the judgment of the district court.

III. It is insisted that the indebtedness shown by the account from 1871 to 1879 was chargeable to a copartnership of which plaintiff's intestate was a member. We think the evidence fails to sustain this position. The intestate, it is shown, did not himself recognize one of these partnerships; another is shown not to have existed; and, by an arrangement between all of the

Kilbourn v. Anderson.

parties, the intestate assumed to pay the indebtedness of the other firm to plaintiff.

IV. In our opinion, the account was continuous. It was of the transactions between the parties pertaining to plaintiff's employment by deceased. This employment was practically continuous. Plaintiff was constantly employed when there was work to be done, or when temporary matters did not interrupt his employment. We think the evidence quite clearly shows that his employment was continuous during all of this long period of time, though prices and the rate of compensation may have been varied at different times. The employment being continuous, the charges for services rendered therein are continuous.

V. Plaintiff's books of accounts contained charges for cash and notes, which defendant insists are not proper items to be established by the books of accounts. Admitting the correctness of this position, it is to be presumed that the court below rejected these items, as the judgment is not in a sum sufficiently large to cover them, together with the items properly established by the books of account.

VI. Counsel complain of evidence by plaintiff pertaining to the book accounts which identified the books, or explained charges by showing the dates thereof and the like. We think this evidence was rightly admitted. The books themselves, we think, were rightly admitted in evidence.

VII. Certain items, amounting to about sixty-seven dollars, were on account of transactions had with the widow after the death of intestate. If it be admitted that these items are not chargeable against the estate, it is not a ground of reversal, as it does not appear that they were allowed by the district court. We will presume they were not, as the evidence establishes other items making up the amount of the judgment, which, we will presume, was rendered for the items properly chargeable to decedent. The foregoing discussion disposes of all questions in the case. The judgment of the district court is

AFFIRMED.

KRUIDENIER BROS. *et al.* v. SHIELDS *et al.*

1. **Appeal: IN APPLICATION FOR NEW TRIAL: FINDING OF COURT.** An application for a new trial under section 8155 of the Code, based on grounds discovered after the term at which the verdict is rendered, is triable by ordinary proceedings, and where the evidence on which the ruling is made is conflicting, this court cannot interfere on the ground of insufficient evidence to sustain the order.
2. **New Trial: EVIDENCE NOT IN CASE CONSIDERED BY JURY.** Where evidence not in the case is improperly taken to the jury room and considered as evidence by the jury, that fact, without further inquiry as to its effect, is ground for a new trial. (See opinion for application of rule.)

Appeal from Mahaska District Court.—HON. DAVID RYAN, Judge.

FILED, MAY 17, 1889.

PETITION by plaintiffs for a new trial under section 3155 of the Code. There was an order granting a new trial, and the defendants appeal.

Geo. W. Lafferty and G. C. Morgan, for appellants.

Bousquet & Earle and John F. Lacey, for appellees.

GRANGER, J.—The sufficiency of the petition in this case was determined in this court, and the case is reported in 70 Iowa, 428. It is again before us on errors assigned upon the trial.

The action was upon a promissory note, the execution of which was admitted. The examination involved to some extent an inquiry as to who wrote a certain receipt, there being testimony that the same person wrote the receipt and the note in suit. The receipt was in evidence, but not the note. After the jury retired for deliberation, they desired the note for comparison with the receipt, and sent the bailiff for it. The papers in the

77	504
102	494
77	504
105	471
77	504
143	151

Kruidenier Bros. v. Shields.

case, with a copy of the note attached, were taken to the jury. The copy was not in the handwriting of the original note, but it was used by the jury supposing it to be the original. These facts are not disputed. The main controversy is, how did these papers get to the jury? As to this, the testimony is not entirely clear, and there is a dispute as to the facts. Appellees insist that they were there without their knowledge or consent, while appellants claim that the testimony shows that they were sent there by the court when the attorney for appellees was present, and without objection; or that the court, after sending them, notified the attorney, and that no objection was made. The facts in this respect are in dispute, and are to be found from the evidence. This is an ordinary proceeding for the purpose of trial. Code, sec. 3155. We only consider errors assigned and argued in such cases. It could not well be disputed that, if the jury without consent of the appellees had a copy of the note, and used it as evidence on the theory that it was the original when it was no part of the testimony introduced, it would necessitate a new trial. The court below seems to have found the facts with the appellees. The testimony was admitted against the objections of the appellants, tending to show the effect of the note as evidence on the minds of the jury; and their answers tend to show that, in consequence of it, they arrived at an entirely opposite conclusion; and it is urged that, under the decisions of this court, such testimony is incompetent. If, for the purpose of the case, we concede this, the result is not changed; as, with our view, if the note was improperly there and used as evidence, that fact, without inquiry as to its effect, should necessitate a new trial; and such fact must have been found by the district court.

AFFIRMED.

ROAF V. KNIGHT.

Estates of Decedents: CLAIMS AGAINST: STATUTE OF LIMITATIONS: EQUITABLE CONSIDERATIONS. Plaintiff, a resident of Massachusetts, seeks in this action to recover a claim against an estate in Iowa. Her claim was not filed within twelve months after the giving of notice of the administration, and hence is barred by section 2421 of the Code, "unless peculiar circumstances entitle plaintiff to equitable relief." As entitling plaintiff to such relief, she alleges that she did not know the law, but was informed by an attorney of her own state, soon after the death of decedent, that two years were allowed by the laws of Iowa for filing such claims, which information she believed and relied on; that she was not at that time able to employ counsel to prosecute her claim; that soon after the appointment of the administratrix she gave her actual notice by letter of her claim; and that the estate was solvent and unsettled. *Held* that these facts did not entitle plaintiff to equitable relief, and that a demurrer to her petition was properly sustained.

Appeal from Boone District Court.—HON. S. M. WEAVER, Judge.

FILED, MAY 17, 1889.

THE plaintiff filed a claim against the estate of D. B. Knight, deceased. The defendant, F. A. V. Knight, administratrix of the estate, demurred to the claim. The demurrer was sustained, and plaintiff appeals.

W. S. Bicksler, for appellant.

Crooks & Jordan and *D. D. Chase*, for appellee.

ROTHROCK, J.—It is averred in the statement of claim that the plaintiff is a resident of the state of Massachusetts, and that, in the year 1880, D. B. Knight, deceased, by certain false and fraudulent representations, and by an oral guaranty, induced the plaintiff to purchase of him three bonds, in the sum of one thousand dollars each, issued by the Independent school district of Riverside, in Lyon county, Iowa; that said bonds were void and of no value, but that plaintiff had no knowledge nor information that said bonds were invalid until after the death of said Knight. It appears

77	506
91	130
77	506
100	520
77	506
117	539
77	506
132	225

Roaf v. Knight.

that Knight died at some time prior to April, 1886, and letters of administration were issued to F. A. V. Knight by the district court of Boone county. The claim was filed in the Boone district court on the eleventh day of January, 1888. The district court sustained the demurrer to the claim on the ground that it was barred by the statute of limitations. The demand belongs to claims of the fourth class as defined by section 2420 of the Code. Section 2421 of the Code provides that all claims of the fourth class, not filed and proved within twelve months of the giving of notice of administration, "are forever barred unless the claim is pending in the district or supreme court, or unless peculiar circumstances entitle the claimant to equitable relief." The claim of the plaintiff was not filed until nearly two years after the administratrix qualified. It was therefore necessary that the plaintiff should set forth in her petition or statement of claim peculiar circumstances entitling her to equitable relief. That part of the petition which it is claimed should take the case out of the statute of limitations is as follows :

"*Fifth.* And your petitioner, for cause of her failure to file her claim before this term of court, says that she did not know that such claims were required by the laws of Iowa to be filed within one year of the date of publication of notice of the appointment of the administratrix; but, on the contrary, she was informed by an attorney at law in Massachusetts, with whom she counseled early in the year 1886, that two years were allowed for the proof of such claims; and she believed such information to be true; and, further, she could not then afford to employ counsel, and prosecute the claim. She heard of the appointment of administratrix about April, 1886; and, by letter to said administratrix, gave actual notice of claim to administratrix as early as the month of April, 1886, or thereabouts. *Sixth.* That said Fannie A. V. Knight has been qualified and is acting as administratrix of said estate; that said estate is solvent and is not yet settled; and that your petitioner's claim made herein is just and equitable."

Roaf v. Knight.

This court has quite frequently been required to determine whether certain facts and circumstances are sufficiently peculiar to entitle a party to equitable relief under the section of the Code above cited. No rule has been adopted as to the facts necessary to arrest the operation of the statute; and it is apparent that, as each case rests upon its own facts, it must be considered, in a measure, upon its own merits. It has been held in some of the cases that the fact that the estate is unsettled when the claim is filed is an important consideration in determining whether equitable relief should be afforded. *McCormack v. Cook*, 11 Iowa, 267; *Johnston v. Johnston*, 36 Iowa, 608. In other cases it has been held that the fact that negotiations had been had with the administrator or his attorney, with the purpose of effecting a settlement of the claim, is an important consideration. *Burroughs v. McLain*, 37 Iowa, 189; *Pettus v. Farrell*, 59 Iowa, 296; *Orcutt v. Hanson*, 70 Iowa, 604. It appears from the averments of the petition in this case that, when the claim was filed, the estate was unsettled and solvent. But, notwithstanding this averment, we think the excuse given for the delay is not sufficient. It is true it is averred that the plaintiff did not know that claims were barred if not filed in one year. There is nothing peculiar pertaining to this want of knowledge of the law, and we think that she should have made some inquiry of some one at the place where her claim was to be adjusted rather than to rely upon advice received from one in the state of Massachusetts. It appears that plaintiff knew who was administratrix, and in April, 1886, wrote a letter giving notice of the claim; and she had such information as induced her to believe it would be necessary to employ counsel to prosecute the same, and yet she delayed filing for nearly two years after that time. We fail to discover that there are any facts alleged which, in our opinion, should be held sufficient to arrest the operation of the statute.

AFFIRMED.

OTCHECK V. HOSTETTER.

1. **Set-off: JUDGMENT AND COSTS.** Where a judgment recovered by plaintiff in one case was properly set off against her note which was in litigation in another case in the same court, it was proper that the costs recovered by her in the first case should also be set off against the note.
2. **Attorney's Fees: ON NOTE IN SUIT BEFORE DUE.** Where the maker of a note, before it was due, brought an action to enjoin the foreclosure of a chattel mortgage given to secure it, and she was entitled to a set-off against the note, and could not pay it at maturity without abandoning her right to the set-off, she could not be said to be in default, and, in rendering judgment against her for the balance due on the note, the holder was not entitled to recover the attorney's fees provided in the note in case suit was brought to collect it.

Appeal from Mahaska District Court.—HON. D. RYAN.
Judge.

FILED, MAY 18, 1889.

ACTION in chancery. The facts of the case, and the relief prayed for and granted, are stated in the opinion. Full relief, as prayed by plaintiff, not being granted, she appeals.

Blanchard & Preston, for appellant.

John F. & W. R. Lacey and *J. M. Herron*, for appellee.

BECK, J.—I. November 24, 1885, plaintiff commenced an action at law in the circuit court of Mahaska county, claiming to recover three thousand dollars from defendant as damages for fraudulent representations in the sale of real estate. December 1, 1885, she commenced in the same court an action in equity to enjoin defendant from foreclosing a chattel mortgage, and asking that the foreclosure be transferred to the circuit court. Plaintiff alleges in her petition that some of the

notes have been paid and others are usurious, and that she is entitled to recover damages for injury to her stock. A preliminary injunction was allowed in the case. The defendant answered, denying plaintiff's claim, and praying that the chattel mortgage be foreclosed, and judgment be rendered on the notes, and for attorney fees. The affidavit of the attorney required by the statute was filed. One of the notes secured by the chattel mortgage was for five hundred dollars, dated November 8, 1883, due January 1, 1888, with eight per centum per annum interest, and attorney's fees if suit be brought to collect it. Plaintiff, in her reply to the answer of defendant, alleges that some of the notes are usurious; others have been paid; and that defendant is indebted to her for injuries to stock. March 17, 1887, plaintiff amends her petition, alleging that on the second day of October, 1886, she recovered a judgment in the law action set out in her petition for \$1,762.25, and costs, with six per centum interest. She also shows that defendant has commenced an action to restrain the collection of her judgment at law until the termination of this action, and praying that the judgment may be applied on the notes and chattel mortgage. The plaintiff in this amended petition unites with defendant in his request that the judgment be set off against the notes.

Defendant files an answer in the law case, in which he asks that the judgment obtained by plaintiff be applied upon his notes secured by the chattel mortgage. He also filed an answer to the amended petition, setting up that the judgment in the law case was not final; that it is void for want of jurisdiction; and other matters which need not be here recited. A decree was rendered declaring the notes secured by the chattel mortgage to be paid and discharged by the judgment at law, and certain damages found and allowed, except the one note which was not due. Upon it the sum of nine dollars was applied. The cause was continued until the note became due, and the lien of the mortgage it was declared should exist for the security of the note.

Otcheck v. Hostetter.

After the note became due plaintiff filed her supplemental petition, showing the facts substantially as above recited, and further alleging that she expended \$207.55 costs in the law case, which it was adjudged defendant should pay; and she also paid \$63.65 in this case, which are taxable against defendant. She asks that these costs may be set off against the note, which has fallen due and is unpaid. The defendant, in reply, alleges that the judgment in the law case has been pleaded by plaintiff and allowed by the decree of the court as a set-off to the notes and chattel mortgage. The plaintiff in her reply denies the allegations of defendant's answer. The case was tried upon the pleadings, and an admission of defendant that the costs had been paid by plaintiff, as alleged in her supplemental petition. The case before us is upon the supplemental petition. The decree allows a credit on the note of nine dollars, found by the prior decree, and the costs in this case, \$63.65, but rejects as credits the costs in the law case. It allows as attorney fees \$38.25, and is a judgment for \$611.48 upon the note, and foreclosed the mortgage for that amount.

II. In our opinion, the costs in the law case should have been applied on the note. They constituted money due to the plaintiff. The same reason that
 1. **SET-OFF:**
 judgment and costs. required the judgment in plaintiff's favor to be set off against the notes demands that the costs shall be set off in the same manner.

III. We think defendant should not recover for attorney's fees upon the note, which were recoverable in case suit was brought to collect it. The
 2. **ATTORNEY'S**
 fees: on note in suit before due. note was in litigation for settlement and adjustment in this suit before it was due. Plaintiff could not, if she would, have paid it at maturity, without abandoning her right to set off the costs against it, some of which the district court by its decree held should be applied on the note. It cannot be said that plaintiff made default on the note, or that the suit was brought to collect it. Plaintiff brings the suit to protect her rights touching that note and others.

 Otcheck v. Hostetter.

We think the attorney fees could only be assessed in case a suit on the note had been actually brought for the purpose of enforcing its collection. But such suit was not brought.

IV. We think the plaintiff should be allowed as a set-off on the note :

(1) The costs in the law case	\$ 207 55
(2) The costs in this case	63 65
(3) The sum applied in former decree.	9 11

Total	\$280 31
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The interest on the note to date of the decree,—five years, seven months..	224 00
Principal	500 00

Total	\$724 00
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Deducting Am'ts to be set off as above, and Int., \$9.35	289 66
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Am't due for which decree should have been entered	\$434 34
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The credits we allow on the note are made as of the day of its maturity. We allow interest on the credits allowed plaintiff from the date of the maturity of the note to the date of the decree,—five and a half months. A decree will be entered in harmony with these views, at the option of plaintiff, in this court, or the cause will be remanded for such a decree in the court below.

REVERSED.

RICHMAN *et al.* v. SUPERVISORS MUSCATINE COUNTY.

1. **Constitutional Law: CURATIVE ACTS: VOID PROCEEDINGS OF SUPERVISORS: MUSCATINE ISLAND LEVEE.** Where proceedings of a board of supervisors are void for want of jurisdiction, and the thing wanting in such proceedings, and which was necessary to be done to give jurisdiction, is something the legislature might have dispensed with by a prior statute, then it is not beyond the power of the legislature to dispense with it by a subsequent curative statute. Accordingly, where the defendant board of supervisors proceeded to construct a levy on Muscatine island, and to assess the cost thereof against certain lands supposed to be benefited thereby, but it was held by this court (*Richman v. Board*, 70 Iowa, 627) that the proceedings were void for want of jurisdiction, "because a petition was not filed in the office of the county auditor, signed by a majority of the persons, residents of the county, owning lands adjacent to the improvement, setting forth the same, and the starting point, route and *termini*," as provided by statute in such cases, *held* that this jurisdictional act was one which the legislature might have dispensed with in the first instance, and that therefore chapter 17, Laws of 1886, enacted to validate said proceedings, was not unconstitutional on the ground that the defect was incurable. (Compare *Boardman v. Beckwith*, 18 Iowa, 292.)
2. ———: ———: MUSCATINE ISLAND LEVEE: COMPENSATION FOR PRIVATE PROPERTY: NOTICE. Said curative act does not provide for the taking of private property without compensation, within the legal meaning of those terms, nor does it authorize the assessment of a tax without an opportunity for a hearing on notice; for such opportunity is specially provided for in the act. (*Gatch v. City of Des Moines*, 68 Iowa, 718, *distinguished*.)
3. ———: ———: ———: LOCAL AND SPECIAL LEGISLATION. Said curative act is not obnoxious to section 30, article 8, of the constitution, which provides that the general assembly shall not pass local or special laws in such cases, where a general law can be made applicable, for no general law could have been made applicable; or if a law could have been framed to meet the case, couched in general language, it would still have been local and special in design and effect; and the mere wording of the law, without regard to legislative purpose, is not the guide for constitutional interpretation. At all events, the enactment of the special law is evidence of the design of the legislature, and of its belief that a general law could not be made applicable; and, as it does not clearly violate the constitutional provision in this regard, this court cannot declare it invalid on that ground. (See *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Board*, 30 Iowa, 9.)

77	513
84	10

77	513
191	192

77	513
92	511

77	513
96	529

98	600
99	562

99	623
100	495

77	513
107	303

107	390
77	513

108	153
77	513

110	299
77	513

112	391
112	727

77	513
117	90

117	168
77	513

118	90
77	513

137	475
77	513

140	172
77	513

4. ——— : ——— : ——— : TITLE. The title of said curative act is as follows: "An act to legalize the proceedings of the boards of supervisors of Muscatine and Louisa counties in locating and constructing a levee on Muscatine island, in said counties, and to provide for an assessment of the costs thereof on the lands benefited thereby." *Held* that the act was not obnoxious to that clause of the constitution (sec. 29, art. 3), which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."
5. **Judges: SUCCESSION: CONTRARY RULINGS: WHICH CONTROLS.** Where a demurrer to a petition for a writ of *certiorari* is overruled, and the defendants make a return to the writ as required by its terms, and, on the trial of the issues made by the return, questions legitimately arise which were involved in the issues presented by the demurrer, and after the determination of the demurrer there is a change in the judges of the court, it is the duty of the court as then constituted to pass upon such issues, and if in that case the court holds at variance with the ruling on the demurrer, the last ruling must be the controlling one in that court.
6. **Former Adjudication: NO BAR TO PROCEEDINGS UNDER CURATIVE ACT.** An adjudication that the assessment and levy of a special tax by a board of supervisors was void for want of jurisdiction, is no bar to proceedings to assess and levy a tax for the same purpose under the provisions of an act of the legislature, framed with reference to such adjudication, and designed to validate the prior proceedings of the board in ordering the work for which the tax was designed to pay.

Appeal from Muscatine District Court.—HON. C. M. WATERMAN, Judge.

FILED, MAY 18, 1889.

CERTIORARI to the board of supervisors of Muscatine county, to test the legality of certain proceedings pertaining to the construction of a levee on Muscatine island, and the assessment of the costs thereof on lands benefited thereby. There was a judgment for the defendants, and the plaintiffs appeal.

Richman & Burke, for appellants.

Jayne & Hoffman, Newman & Blake and H. J. Lauder, for appellees.

GRANGER, J.—In 1882 proceedings were instituted by the boards of supervisors of Muscatine and Louisa counties for the construction of a levee on Muscatine island, from a point near the city of Muscatine, in Muscatine county, to Port Louisa, in Louisa county, a distance of nearly twelve miles. The levee was constructed, and the costs thereof assessed against certain lands supposed to be benefited by the improvement, among the owners of which are the plaintiffs, some sixty in number. In a proceeding similar to this the action of the defendant board was set aside, and its proceedings adjudged void, by this court, for want of jurisdiction. See *Richman v. Board*, 70 Iowa, 627. The Twenty-first General Assembly, with a view to cure the defects in the proceedings of the board, and enable it to assess the costs of construction and maintenance of the levee against the lands benefited, enacted what is spoken of in this case as a “curative act,” the material portions of which are as follows:

“Whereas, the proceedings of the boards of supervisors of the counties of Muscatine and Louisa, in the years 1882 and 1883, in respect to the location and construction of a levee on Muscatine island, in said counties, along or near the west bank of the Mississippi river, from the city of Muscatine to Port Louisa, and in assessing the cost thereof on the land benefited thereby, and claimed to have been invalid because said proceedings do not show upon their face that said levee was petitioned for by a majority of the owners of land adjacent thereto, and because, as it is claimed, such majority did not in fact petition therefor, and because of an alleged partial deviation in locating and constructing said levee from the route petitioned for, and because of other alleged irregularities and informalities; and whereas, on a writ of *certiorari* issued out of the circuit court of Muscatine county on the petition of sundry owners of lands in said county assessed for the costs of said levee, the assessment of the lands of said petitioners have been by the judgment of said court adjudged invalid, and set

Richman v. Supervisors Muscatine Co.

aside; and whereas, the said levee was constructed under and in pursuance of the said order and proceedings of said boards, and under contract entered into under the same and on the faith thereof; Be it enacted by the general assembly of the state of Iowa:

“ ‘Section 1. That proceedings of the boards of supervisors of the counties of Muscatine and Louisa, in the years 1882 and 1883, in respect to the location and construction of a levee on Muscatine island in said counties, from the city of Muscatine to Port Louisa, along or near the west shore of the Mississippi river, including the orders of the boards of supervisors for the location and construction of said levee, the letting and making of contracts therefor, the order for issuing warrants for payment for the work done in said construction, and the warrants issued thereunder, be, and the same are hereby, legalized, and shall be held and decreed valid and effectual to the same extent and effect in all respects as to said proceedings as if the same had fully conformed to the law when the same were had and taken; and said levee, as actually constructed, shall be held and deemed to be a lawful levee, to be maintained and repaired as provided by law in respect to such public improvements; and all provisions of the law applicable to levees duly constructed under chapter 2, title 10, of the Code, and the amendments thereto, shall apply to the said levee.

“ ‘Sec. 2. The boards of supervisors of Muscatine and Louisa counties, respectively, shall, at their regular meetings next after the expiration of thirty days from the taking effect of this act, proceed to ascertain anew the total amount of the cost and expense of the construction of said levee, including interest accrued and to accrue on the excess of the amount of any unpaid warrants issued for payments due to contractors, over and above the amount of money applicable to such payments, now in the hands of the treasurers of Muscatine and Louisa counties, and including all costs and expenses of the proceedings in locating and constructing said levee (exclusive of any costs or expenses of litigation

Richman v. Supervisors Muscatine Co.

in reference thereto), and any amount necessary to compensate for property appropriated for said levee, and said boards shall reapportion and reassess the amount so ascertained among and upon the lands in said counties benefited by location and construction of the said levee in proportion to the amount of benefit to said lands, respectively. Said boards shall take as the basis for such reapportionment and reassessment the lists or schedules of lands in their respective counties heretofore assessed by them for said levee, as benefited thereby. But all persons interested in or affected by said assessments shall have the right to appear and be heard before said boards in respect to said apportionments and assessments, and the said boards shall on such hearings make such changes, both in respect to the lands to be assessed and the amounts to be assessed thereon, respectively, as in their judgment may be necessary, to make such apportionments and assessments just and equitable, and on the completion of said reapportionments and reassessments all the provisions of the law applicable to apportionments and assessments made under and by virtue of chapter 2, title 10, of the Code, and the amendments thereof in respect to the mode of collection and application of the proceeds thereof, and appeals therefrom, including the provisions of sections six and seven of chapter 85, of the Acts of the Eighteenth General Assembly, shall apply to the said reassessments hereby directed: provided, that the owners of any lands so assessed shall be entitled to credit upon their said reassessments, for any payments made and not refunded upon any previous assessments made or assumed to be made upon such lands, respectively, for or on account of the construction of the said levee.

“ ‘Sec. 3. This act, being deemed of immediate importance, shall take effect from and after its publication in the Muscatine Journal and the Wapello Republican, newspapers published in Muscatine and Louisa counties, and in the Iowa State Register, a newspaper published at Des Moines, Iowa, such publications to be without expense to the state.’ ”

Under the authority of these provisions of the law, the defendant board proceeded to reapportion and reassess the costs of such improvements, taking as a basis the lands which in the prior proceedings had been reported as benefited by such improvement or construction. The proceedings resulted in the lands of the plaintiffs being assessed with amounts varying in proportion to the adjudged benefits thereto. The district court sustained the action of the board, and the record presents a number of interesting and important questions as to the legality of the proceedings of the board on constitutional and other grounds.

I. To a proper understanding of the contentions of counsel, it is important to have in mind that in the proceeding prior to the former adjudication between these parties in this court the lands claimed to be benefited by the improvement had been selected under the provisions of the law prior to the curative act in question, lists or schedules thereof had been prepared, and the levee had been located and constructed. At this point in the proceeding the action of the board of Muscatine county (defendant herein) was by this court declared void for want of jurisdiction, because of a failure to file in the office of the county auditor "a petition signed by a majority of persons resident in the county owning lands adjacent to such improvements, setting forth the necessity for the same, and the starting point, route and *termini*." It should also be kept in mind that the curative act, in providing for a reapportionment and a reassessment of the costs of the construction and future maintenance, provides that the board shall take as the basis of its action the lists or schedules of land heretofore assessed by them for said levee, and it further attempts to make valid the act of the board in the location and construction of the levee. In other words, the legislature undertook to make valid such acts of the board as this court had adjudged to be void. The position of appellants is succinctly and clearly stated, and we quote it as introductory to the further discussion

1. CONSTITUTIONAL law: curative acts: void proceedings of supervisors: Muscatine Island levee.

Richman v. Supervisors Muscatine Co.

of the question: "We wish our position to be understood in this matter, and we now explicitly state that all irregularities and informalities in the proceedings of boards of supervisors, where they have obtained jurisdiction of the subject-matter of such proceedings, and of the proper persons, may be cured by an act of the general assembly. But where there is a want of such jurisdiction, and their acts are for that reason void, no curative act can ever reach them." It cannot be questioned that in this case the legislature has run counter to the proposition thus stated by counsel, and its correctness as a proposition of law is to be determined. A concession by counsel, further on in the argument, enables us to come at once to the point in question: "We know it is contended, and will be, and we concede it to be the law, that if the thing wanting in such proceedings, or which failed to be done, is something the legislature might have dispensed with by a prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." Accepting this as the law (and its correctness could not on authority be questioned), we look to the former decision of this court to see for what reason the prior acts of the board were declared void. It is there at once seen that the failure of jurisdiction was entirely dependent upon the fact that "a petition was not filed in the office of the county auditor, signed by a majority of the persons, residents of the county, owning lands adjacent to the improvement, setting forth the same, and the starting point, route and *termini*." This is the only ground upon which the court denied the jurisdiction of the board, and it is fair to state that, with such a petition properly filed, jurisdiction would have obtained.

The query then is, could the legislature have dispensed with that requisite to the jurisdiction of the board in the first instance?—that is, would it have been competent for the legislature, in the enactment of the law under which the board first proceeded, to have provided that without such petition the board might determine the necessity for the improvement, its route

and *termini*, and cause lists and schedules of the lands to be benefited thereby to be prepared, and thereafter, upon a prescribed notice to owners of the lands, with opportunities for a hearing before the assessment, and with the right of appeal, could the board take such action as would be binding upon the land-owners? We are not without adjudicated cases in this state involving facts so similar as to make them controlling. The case of *Boardman v. Beckwith*, 18 Iowa, 292, is one. By a change in the revenue laws of the state there was no provision whatever for a levy of taxes for the year 1858, but, notwithstanding their want of authority, an assessment and levy were made. In 1860 the legislature passed an act legalizing said assessment and levy, and authorized the collection of the same as taxes levied under the provisions of existing laws. See Revision, 1860, p. 130. The case involved the validity of the sale of lands for the taxes of that year, and by virtue of the legalizing act the sale was sustained. In that case, as in this, much stress was placed upon the fact that the levy of the tax was void, and the opinion in effect concedes the illegality of the levy, but it clearly maintains the doctrine that it was competent for the legislature to make valid that which was before void. The court uses this language: "That it is competent to thus legislate we entertain no doubt. The power of the legislature to pass acts of this character, conducive as they are to the general welfare, and based upon considerations of controlling public necessity, is, in our opinion, undoubted." As to the levy of the taxes in 1858 being void, see *Iowa R. R. Land Co. v. Soper*, 39 Iowa, 112, where, in commenting thereon, it is treated as "utterly void." That is a stronger case as against appellants than the one at bar, as in this case the acts brought within the purview of the curative act are none of them prohibitive of the right of the land-owner to be heard before the assessment or levy. As to the particular acts legalized, none of them are of such a character that the land-owners would have a legal right to be heard. They were merely determinative of the necessity

Richman v. Supervisors Muscatine Co.

for such an improvement, the locality, and the listing of lands supposed to be benefited thereby. The case involves no question of damage in consequence of the location of the levee, and the only interest of the land-owner, as distinct from matters of public concern, is his personal liability for the expense of construction. In this respect the curative act affords an opportunity for a hearing before an assessment, both as to the apportionment and assessment, and, if aggrieved by the decision of the board, there is the right to appeal. The adjudicated cases relative to local public improvements in our cities and towns, so far as applicable, are all in harmony with such an exercise of power by the legislature, and we do not think it advisable to occupy space with their citation.

II. It is urged that if the proceeding is sustained, it amounts to the taking of private property without just compensation. No more so than in the cases of other imposition of taxes. The law for such an improvement can only be justified on the theory that it is a public necessity; that it is a matter of police regulation, affecting the health, welfare and happiness of the people. Whether it amounts to that in fact is not the question. The legislature may and does provide for the settlement of such questions of fact by proper agencies, and a mistake as to the fact no more renders the tax imposed for its purpose the taking of property without compensation than does the imposition of other taxes for special purposes which may afterwards prove fruitless. In this connection we are referred to the case of *Gatch v. City of Des Moines*, 63 Iowa, 718. In that case the defendant city had by resolution provided for the construction of a system of sewers, and that the cost should be assessed upon the adjacent property *pro rata*. The assessment of this *pro rata* share was made without notice to the property-owner, and in that respect it was adjudged illegal. There is no holding in the case that the adoption of the resolution to make the improvement and to burden the adjacent property with the costs

2. —: —:
Muscatine
island levee:
compensation
for private
property:
notice.

Richman v. Supervisors Muscatine Co.

thereof was not legal, but before the burden should attach by way of assessment there should be an opportunity for hearing upon notice. This opportunity is clearly and fully given in the case at bar, the curative act fixing the time and place of which all must take notice.

III. The curative act is assailed as being obnoxious to section 30, article 3, of the constitution, in that it is a local or special law. We regard this as the most doubtful question involved in the entire consideration of the case. The provision of the constitution is as follows: "The general assembly shall not pass local or special laws in the following cases: For the assessment and collection of taxes for state, county or road purposes. * * * In all the cases above enumerated, and in all other cases where the general law can be made applicable, all laws shall be general and of uniform operation throughout the state." It cannot be questioned that the curative act is both local and special in its application. Its whole tenor and bearing are to that end. It is in aid of a particular and a local enterprise. It can only be sustained upon the theory that a general law cannot be made applicable. Counsel for appellants, in argument, ingeniously, by way of illustration, attempt to show that a general law would reach the object. If the mere wording of the law, without regard to legislative purpose, is to be the guide for constitutional interpretation, we have no doubt that it could be effected. But was such the intention of the framers of the constitution? To so hold is to place ourselves in harmony with the often repeated attempts at legislative evasion, when confronted by constitutional law, which we have no desire to do. It would be difficult to conceive a state of facts that could not be brought within the provisions of a general law, with such a construction. No such purpose was intended by the constitutional enactment, but, on the contrary, it presumes conditions under which general laws are not applicable, and special or local laws are designed. While the legislature might recite

Richman v. Supervisors Muscatine Co.

the particular facts as to the "island levee," including acts done or omitted, and then provide that whenever such a state of facts should exist certain results will follow, it would be done with a view solely to effect a local and special purpose. The fact that the legislature framed the act in question as it did is evidence of its design, and that it believed that the general law could not be made applicable; and we are not justified in disturbing its acts on constitutional grounds, except where the infraction is clear, palpable and plainly inconsistent. *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Board*, 30 Iowa, 9, and cases there cited. By the curative act it was not only the purpose to provide for the assessment and payment for the improvement, but the validity of the location was questioned; and a principal purpose of the act was to legalize that, and constitute it a public improvement. Its accomplishment under general legislation would be very difficult, if not impossible. The line or route of the levee did not conform to the original plan as a whole, and an effort to legalize it by general legislation would have involved a minuteness of description inconsistent with any other like state of facts, and we may here dispose of the question on the theory, at least, that the act is not so clearly obnoxious to constitutional requirements as to justify an interference by us.

IV. It is urged that the curative act is vulnerable to the provision of the constitution that "every act shall embrace but one subject, which shall be expressed in the title;" and the argument extends not only to the curative act, but to the prior acts forming a basis for the proceeding to construct the levee. We think it unnecessary to look beyond the curative act itself. Whatever may be true as to former acts, the curative act seems sufficient. The title of the act is "An act to legalize the proceedings of the boards of supervisors of Muscatine and Louisa counties in locating and constructing a levee on Muscatine island, in said counties, and to provide for an assessment of the costs thereof on the lands benefited thereby." The argument

Richman v. Supervisors Muscatine Co.

proceeds upon the theory that legalizing the proceedings of the board is one subject, and providing for an assessment on the lands is another. It is not different in principle from a law entitled "An act to provide for the construction of an asylum, and to provide means of payment therefor." The one as clearly embraces two subjects as the other, but neither is objectionable from a constitutional standpoint. The constitutional language is: "Every act shall embrace but one subject, and matters properly connected therewith." It cannot be claimed that in the construction of a public improvement the payment is not a matter properly connected therewith, and it cannot be a matter of valid objection that both are expressed in the title of an act providing for the construction. The curative act is a remedy for any such defects existing prior thereto, if they did exist, and its title is not open to the objection urged.

V. At the trial in the district court there was a demurrer to the petition, which was overruled, after which the defendants made a return to the writ, as required by its terms. At the further hearing there was a change in the *personnel* of the court, and it is urged that the issues presented by the return were the same as those arising on the demurrer to the petition, and that there was a readjudication thereof against the objection of appellants, and its correctness is urged for our consideration. We think the change of judges makes no difference. It is the same court. We are not prepared to hold that if, during the trial of the issues of an action, a court becomes convinced of an error he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule was to obtain. If, on the trial of the issues presented by the return, questions legitimately arose involved in the issues presented by the demurrer, it was the duty of the court to pass upon them, and in so doing it was not required to follow the ruling on the demurrer as against its convictions. With the proper steps taken to guard the record, it is difficult to see how questions should thus arise, and yet,

5. JUDGES: succession: contrary rulings: which controls.

Richman v. Supervisors Muscatine Co.

perhaps, they may. It is understood that the question arose in this case from the rulings of different judges, and different views as to the law. It was certainly the duty of the defendants, after the ruling on the demurrer to the petition, to make a return of the facts, as such was the requirement of the writ. If it stated facts in exact harmony with the averments of the petition, as is claimed in this case by appellants, there would then be no question of fact, and the law as applicable to the petition must govern. If in that case the court should hold at variance with the holding on the demurrer, we think the last ruling must be the controlling one in that court. In this case, it seems, other issues were made, as testimony was taken, and we think the holding above indicated must govern. The peculiarities of this case may distinguish it from the others of more common practice.

VI. It is urged with much earnestness that the prior suit in this court between these parties constitutes a bar to any proceedings under the curative act for the assessment and collection of these taxes, on the ground that by such adjudication the assessment and levy thereof were declared void. The taxes in the former suit were avoided on the ground that there had been no legal assessment or levy. The object of the curative act was to create an obligation on the part of those who had been benefited by the improvement to pay therefor. The act makes direct reference to the adjudication, and provides for a reapportionment and reassessment with a view to a redetermination of the question of liability. We think it was competent for the legislature to so provide. The authority of the legislature to provide for new trials or the re-examination of issues is not questioned. The former trial determined no vested interest or right, and is in no sense a bar to the proceeding under the new law.

VII. Quite a number of questions have been urged, not referred to in this opinion, but we have endeavored to discuss the principal ones, and with the space already

6. FORMER adjudication :
no bar to proceedings under curative act.

 Evans v. Phelps.

devoted we must content ourselves by saying that the questions have received consideration, and we think none of them are fatal to the judgment. Some of the questions argued—with regard to errors and irregularities in the proceedings of the board—are not questions for review in this proceeding. The remedy in such cases is by appeal from the action of the board. The judgment of the district court is

AFFIRMED.

 EVANS V. PHELPS.

District Court: JURISDICTION : CAUSES TRANSFERRED BY CONSENT FROM JUSTICES' COURTS. There is no provision in the statutes, and therefore no warrant for the transfer to the district court of causes begun in justices' courts, except by appeal; and the district court has no jurisdiction to entertain such a cause transferred to it by consent, but should dismiss it upon motion of one of the consenting parties.

Appeal from Mahaska District Court.—HON. DAVID RYAN, Judge.

FILED, MAY 18, 1889.

THIS suit was originally commenced before the mayor of the city of Oskaloosa. The venue of the action was changed to a justice of the peace, where there were two trials by jury, in both of which the jury failed to agree upon a verdict. Thereupon the counsel for the parties entered into an agreement to transfer the cause to the district court for trial. The cause was docketed in the district court, and the defendant moved the court to dismiss it, upon the ground that the transfer of the cause was unauthorized by law, and conferred no jurisdiction on the district court. The motion to dismiss was sustained, and plaintiff appeals.

James A. Rice, for appellant.

Blanchard & Preston and *Haskell & Greer*, for appellee.

77	526
97	688

77	526
e132	23
j132	29

ROTHROCK, J.—The action was upon an account for money received. The amount in controversy was fifty dollars, and the appeal comes to us upon a certificate of the trial judge, in which the question for determination is, in substance, whether the agreement to transfer the cause to the district court for trial was binding on the defendant, and whether the stipulation invested the court with jurisdiction of the cause. It is provided by section 3575 of the Code, that any person aggrieved by the final judgment of a justice of the peace may appeal therefrom. The jurisdiction of our courts is prescribed by statute, and there is no provision made for the transfer of actions of this kind from a justice of the peace to the district court. On the contrary, the statute contemplates that a cause of this character, once commenced before a justice of the peace, shall proceed to a final determination, and the only provision made for transferring it to the district court is by appeal. The plaintiff may, of course, dismiss his action and commence it anew in any other court having jurisdiction. The question presented in this case has not been heretofore determined by this court. We reach the conclusion that the district court did not have jurisdiction of the cause, for the reason that the transfer does not appear to be authorized by any provision of the statute. It is not allowable under the practice act prescribed for justices of the peace, nor by any provision of the statute for change of place of trial from one court to another. The disposition of the case renders it unnecessary to determine the questions presented by appellee upon motions to dismiss the appeal.

AFFIRMED.

77	528
109	156
77	528
134	348
77	528
143	236

KNAPP & Co. v. COWELL.

Banks and Banking: APPLICATION OF DEPOSIT ON NOTE OF DEPOSITOR : INSTRUCTION. Plaintiffs, who were bankers, sued defendant, a depositor, for an amount alleged to be due on an overdraft, and they alleged, among other things, that they applied a portion of defendant's deposit, at his request, in payment of a balance due on his note held by them. On this issue the court so instructed the jury that they would infer that plaintiffs had no right to apply the deposit on the note unless defendant had so requested it, as alleged in plaintiffs' petition. *Held* error, because they had such right without any request on his part, and the allegation of a request was superfluous and not necessary to be proved.

Appeal from Franklin District Court.—HON. JOHN L. STEVENS, Judge.

FILED, MAY 18, 1889.

THE plaintiffs are bankers, and they brought this action to recover of the defendant, who deposited money in their bank, an amount claimed to be due on an overdraft. The defendant denied that he at any time received from the plaintiffs more than he had deposited, and claims that the plaintiffs did not pay to him the full amount of his deposits, and he claimed a judgment against the plaintiffs. There was a trial by jury which resulted in a verdict and judgment for the defendant. Plaintiffs appeal.

Hemenway & Grundy, for appellants.

J. W. Lake, for appellee.

ROTHROCK, J.—It is conceded that the defendant deposited with the plaintiffs the sum of one thousand dollars on the thirty-first day of May, 1881. The defendant claimed that he made a further deposit of two hundred dollars with the plaintiffs on the twenty-second day of November, 1880. This is denied by the

plaintiffs. If the claim of the defendant is correct, the aggregate amount of the deposits was twelve hundred dollars. It appears that, before any deposit was made by the defendant, the plaintiffs held his promissory note for several hundred dollars; and the plaintiffs aver that, of the one thousand dollars deposited, the plaintiffs, at the request of the defendant, applied of the deposit the sum of \$177.75 as a balance due on his note. The defendant denied that he made any such request, and averred that, if any such sum was applied on said note, it was wrongful and without the consent of the defendant.

There were but two questions submitted to the jury—*First*, whether the defendant deposited with the plaintiff the sum of two hundred dollars on or about the twenty-second of November, 1880; and, *second*, did the plaintiffs, at the request and by the direction of the defendant, apply \$177.75 of his deposit in payment of the balance due on his note? If the two-hundred dollar deposit was made, the plaintiffs are indebted to defendant in the sum of \$106.80. If it was not made, the defendant is indebted to plaintiffs in the sum of \$93.20, and interest. The court among other instructions charged the jury as follows: “(7) I hand you three forms of verdict. If you find plaintiffs entitled to recover of defendant, you will determine the amount, including interest, and insert the same in the first form of verdict. If you find that plaintiffs are not entitled to recover, but that defendant is entitled to recover of plaintiffs on his counter-claim, you will insert amount in second form of verdict. And if you find that plaintiffs are not entitled to recover, and defendant is not entitled to recover anything on his counter-claim, then your verdict should be for the defendant, and you should use the third form of verdict, which contains no blank,—is for defendant simply: ‘No. 1. We, the jury, find for the plaintiffs, and assess their recovery at \$——.’ ‘No. 2. We, the jury, find for the defendant, and assess his recovery at \$——.’ ‘No. 3. We, the jury, find for the defendant.’” The jury returned the third form of

Knapp & Co. v. Cowell.

verdict. This was a finding that the defendant was not entitled to recover on his counter-claim, and that he did not deposit the two-hundred dollar item. It was also a finding that the plaintiffs did not, at the request and by the direction of defendant, apply \$177.75 in payment of the balance due on the note.

Upon the question as to the application of the money to the payment of the note the jury were instructed as follows: "If you find from the evidence that defendant, at the time he deposited the thousand dollars, was owing plaintiffs a balance of \$177.75 on the note mentioned, and requested or directed plaintiffs to apply said amount on said note and charge to his account; and, also, that plaintiffs did so apply said sum, and defendant has thereby received to his use a larger amount than he had deposited, which sum is still due and owing,—plaintiffs are entitled to recover such amount, with interest at six per cent. from June 4, 1883. But, if you find that plaintiffs have failed to establish such a state of facts, they are not entitled to recover; and your verdict should be for defendant."

This instruction, and others of like import, are claimed to be erroneous, because the court did not define what state of facts would amount to a request and direction to apply the money to the payment of the balance due on the note. We think that, under the facts of the case, the instructions should have been more explicit upon this question. It was wholly immaterial whether there was an express request or direction to so apply the money. It is true the plaintiffs, by their petition, averred a request, and the court, in the instructions, followed the petition. But a party is not required to prove the unnecessary averments of a pleading. All that is required is proof sufficient to establish the cause of action or defense; and it was wholly immaterial whether the defendant expressly requested the application or not. If the defendant was indebted to the plaintiffs on the note, and plaintiffs applied one debt in liquidation of the other, the defendant has no right to complain and repudiate the application of the money because

Farley v. O'Malley.

he did not request it. There is nothing mysterious about a bank account. It is subject to the rules applying to debtor and creditor the same as any other account; and we think that the instruction as to this third form of verdict—which the jury adopted—was not proper in this case. The theory upon which the verdict is founded is that the two hundred dollars were not deposited, and that the plaintiffs were not entitled to recover, not because the \$177.75 was not applied on the note, but that it was not so applied at the express request and direction of the defendant. REVERSED.

FARLEY V. O'MALLEY.

77	531
91	109
77	531
106	42

1. **Intoxicating Liquors: LAWS OF 1886, CHAPTER 66: APPLICATION TO PENDING SUITS.** Chapter 66, Laws of 1886, providing that in actions to abate liquor nuisances "evidence of the general reputation of the place designated in the petition shall be admissible for the purpose of proving the existence of such nuisance, and, if successful in the action, the plaintiff shall be entitled to an attorney's fee of not less than twenty-five dollars, to be taxed and collected as costs against the defendant," *held* applicable to suits pending when the law was enacted. (Compare *McLane v. Bonn*, 70 Iowa, 752; *Drake v. Jordan*, 78 Iowa, 707.)
2. **Evidence: ADMISSIONS IN ANSWER.** A paragraph in an answer which is an independent and distinct admission of material matters in the petition is admissible in evidence for plaintiff, where defendant introduces the rest of the answer.
3. **Liquor Nuisance: ATTORNEY'S FEES: AMOUNT OF: IN APPELLATE COURTS.** Under chapter 66, Laws of 1886, the plaintiff, if successful in an action to abate a liquor nuisance, is entitled to recover such attorney's fees as may be reasonable for the service necessarily rendered, in whatever court, not less than twenty-five dollars. In this case which was begun in the district court, removed to the federal court, appealed to the supreme court of the United States, and remanded to the district court where it was instituted, *held* that an attorney's fee of three hundred and fifty dollars was not unreasonable and should have been allowed upon the evidence.
4. **Judgment: AGREEMENT TO ENTER IN VACATION.** Where the parties consented that judgment should be entered in vacation as of the last day of the preceding term, but it was entered a few days after the opening of the next term, *held* that this was not prejudicial to defendant, and was no ground for reversal.

Farley v. O'Malley.

5. **Liquor Nuisance : ERROR IN REFUSING INJUNCTION.** Where in an action to enjoin a liquor nuisance the findings of the court, sustained by the evidence, fully warranted a permanent injunction, it was reversible error not to grant it.

Appeal from Dubuque District Court.—HON. C. F. COUCH, Judge.

FILED, MAY 18, 1889.

ACTION to declare a certain place a nuisance, to abate the same, and for perpetual injunction, upon allegations that the same was being kept for the unlawful keeping and selling of intoxicating liquors. The case was instituted on the fourth day of September, 1884, in the district court of Dubuque county, and removed to the federal court, taken on appeal to the supreme court of the United States, and remanded to the district court of Dubuque county (7 Sup. Ct. Rep. 1373), February, 1887, in which court it was tried before Hon. C. F. COUCH, Judge, at the October term, 1887, and taken under advisement, parties agreeing that decision might be made in vacation as of the last day of said October term. On the ninth day of February, 1888, said court then being in session, Hon. J. J. NEY, judge presiding, a judgment entry was sent by Judge COUCH from Waterloo to the clerk of the court to be made in said cause, and the same was entered of record. On the trial the plaintiff introduced S. P. Adams as a witness, who testified that he knew the reputation of the defendant's place to be that of a place where intoxicating liquors were sold and kept for sale, and also as to the value of his services as attorney for the plaintiff, and as to the amount paid by him to attorneys in Washington who appeared for plaintiff in the supreme court. Plaintiff also offered the third paragraph of defendant's answer. All of this testimony was admitted subject to defendant's objection, and the admission of the same is assigned by defendant as error, with the further assignment that the court erred in allowing an attorney's fee

Farley v. O'Malley.

of one hundred dollars, and that the decree was erroneously entered, there being no authority to enter the same, under the stipulations, after another term of court had commenced, and that the finding should have been for defendant. The plaintiff assigns as error that the court erred in allowing only one hundred dollars attorney's fee, and in failing to grant an injunction as prayed in plaintiff's petition.

S. P. Adams, for plaintiff.

Fouke & Lyon and *McCeney & O'Donnell*, for defendant.

GIVEN, C. J.—I. This action was instituted under the provisions of chapter 143, Acts of Twentieth General Assembly. Before trial, chapter 66, Laws of Twenty-first General Assembly, took effect, wherein it is provided that “evidence of the general reputation of the place designated in the petition shall be admissible for the purpose of proving the existence of such nuisance, and, if successful in the action, the plaintiff shall be entitled to an attorney's fee of not less than twenty-five dollars, to be taxed and collected as costs against the defendant.”

It is claimed in behalf of appellant that these provisions do not apply to this case, because it was pending at the time of the passage of the act. The opinions of this court as announced in *McLane v. Bonn*, 70 Iowa, 752, and *Drake v. Jordan*, 73 Iowa, 707, are a sufficient answer to this position. We see no reason for modifying or changing those opinions; hence there was no error in admitting evidence as to the reputation of the place nor as to the value of the attorney's services.

II. The third paragraph of the defendant's answer is an independent and distinct admission of material matters in the petition, and was properly admitted in evidence. No prejudice could result from admitting it, as the defendant introduced the other part of the answer.

1. INTOXICATING
liquors: Laws
of 1886, chap-
ter 66: appli-
cation to
pending suits.

2. EVIDENCE:
admissions in
answer.

Farley v. O'Malley.

III. As already stated, there was no error in admitting testimony as to the amount of attorney's fee.

Chapter 66, Acts of Twenty-first General Assembly, being applicable, the plaintiff was entitled to such attorney's fees as might be reasonable for the service necessarily rendered in the case, in whatever court not less than twenty-five dollars.

8. LIQUOR
nuisance:
attorney's
fees: amount
of: in appel-
late courts.

IV. Section 183, Code, provides, "with consent of parties, action * * * may be taken under advisement by the judges, decided and entered on record in vacation, or at the next term."

4. JUDGMENT:
agreement to
enter in vaca-
tion.

The consent of the parties was that decision was to be made in vacation, as of the last day of the October term. We fail to see wherein the defendant could be prejudiced by the judge withholding the decision for a few days beyond the vacation, and conclude that if it were error to do so, it was without prejudice.

V. The plaintiff assigns as error the refusal of the court to allow a permanent injunction. The findings of

the court as shown in the decree are fully sustained by the evidence, and warranted the granting of a permanent injunction. We see no reason why the permanent injunction

5. LIQUOR
nuisance:
error in
refusing
injunction.

was not granted.

VI. The plaintiff also assigns as error the refusal of the court to allow more than one hundred dollars attorney's fee. The only testimony as to the

SAME AS NUM-
ber 8.

value of the attorney's service rendered was by the attorney himself, who stated the services to be worth three hundred and fifty dollars, which, in view of the various courts into which the case has been carried, we think is quite reasonable.

The decree of the district court is affirmed on the defendant's appeal, and reversed on the plaintiff's appeal, and decree will be entered in this court granting permanent injunction as prayed, and for costs, including an attorney's fee of three hundred and fifty dollars. On defendant's appeal the case is affirmed, and upon plaintiff's appeal is

REVERSED.

THE CEDAR RAPIDS, IOWA FALLS AND NORTHWESTERN
RAILWAY COMPANY v. COWAN *et al.*

1. **Instructions: NO EVIDENCE: IMMATERIAL QUESTION.** The court properly refused in this case to allow the jury to pass on the question of agency, because there was no evidence tending to establish the alleged agency, and under the evidence the question was immaterial.
2. **County Treasurer: FAILURE TO PAY RAILROAD TAX: LIABILITY.** Where a county treasurer failed during his term of office to pay over on demand to a railroad company the taxes voted to the company, and which he had collected, and he did not turn over the money to his successor, and it was never passed to the credit of the county nor used for its benefit, neither his successor nor the county was liable therefor, but his failure was a breach of his official bond, for which he and his sureties were liable. (See opinion for citations.)
8. **Procedure: JURY TRIAL: REMARK OF COURT AS TO EFFECT OF EVIDENCE.** In sustaining an objection to an inquiry into matters contained in a stipulation in another case, and introduced in evidence in this, the court said in the presence of, but not to, the jury: "I shall hold that by that stipulation defendants acknowledged that there was twelve hundred dollars and interest due the said railroad company [plaintiff herein] that has not been paid." The charge of the court fairly submitted to the jury the question of indebtedness, and there was no real conflict in the evidence as to the fact that the amount named was due the plaintiff. *Held*—against the objection that the remark was in substance an instruction as to the effect of the evidence, and unduly affected the verdict—that under the circumstances it could have worked no prejudice to defendants. (Compare *Hall v. Carter*, 74 Iowa, 368.)
4. **County Treasurer: BOND OF: WHO MAY SUE ON.** The bond of a county treasurer was conditioned that he "shall promptly pay over to the person or officer entitled thereto all money which shall come into his hands by virtue of the said office, and shall promptly account for all balances of money remaining in his hands at the termination of his office." The county was the obligee in the bond. The treasurer collected taxes voted in aid of a railroad company, and neither paid them over to the company, when demanded, during his term of office, nor turned them over to his successor. *Held* that the company was the proper party to bring an action on the bond for his defalcation, under Code, section 2552. (*State v. Henderson*, 40 Iowa, 422, distinguished.)

77	535
81	192
77	535
97	371
77	535
120	640
77	535
144	328

Appeal from Hardin District Court.—HON. J. H. HENDERSON, Judge.

FILED, MAY 18, 1889.

ACTION on the official bond of P. J. Cowan, to recover an amount of money collected by him as treasurer of Hardin county, and alleged to have been appropriated to his own use. There was a trial by jury, and a verdict and judgment for plaintiff. The defendants appeal.

Geo. W. Ward, for appellants.

Albrook & Hardin and *C. E. Albrook*, for appellee.

ROBINSON, J.—Defendant P. J. Cowan was treasurer of Hardin county for the term of two years, commencing in January, 1882. During his term of office he collected the money in controversy as treasurer. It was the proceeds of taxes voted to aid plaintiff in the construction of a railway, by virtue of chapter 123, Acts of Sixteenth General Assembly. Plaintiff, in December, 1883, drew a draft on Cowan as treasurer for the sum of twelve hundred dollars. It is shown that more than the amount of the draft had then been collected by Cowan for plaintiff, which had not been paid to it. The chief controversy in the case relates to the payment of the draft.

I. Fred W. Race was in the employ of Cowan as his deputy during the years 1882 and 1883. On the twenty-fifth day of December, 1883, during the absence of Cowan, he received the draft in a letter from plaintiff, and took it to the treasurer's office, where he put it in a case in which such papers were usually kept. He did not pay the draft, nor did he take any money from the treasury for that purpose. He claims that he asked Cowan, when he returned, to pay the draft. Cowan claims that he first saw the draft a few days after he had surrendered the office to his successor, in January, 1884; that he found

1. INSTRUCTIONS:
no evidence:
immaterial
question.

it among the paid vouchers of the preceding month; and that, supposing it had been paid, he gave himself credit of its amount on the treasurer's books. None of the evidence shows, or tends to show, that the draft was in fact ever paid, and that it was not paid is clearly established. Appellants complain of certain rulings of the court in refusing to permit the jury to pass upon the question whether or not the draft was received by Race as the agent of plaintiff. We think there was no error in these rulings. Cowan had requested plaintiff to draw on him for twelve hundred dollars, a short time before the draft was received. It is not shown that either plaintiff or Race regarded the latter as the agent of the former. It is not shown that it knew of the existence of Race. It is true the latter stated that the draft came in a letter which he opened, but it is not shown that the letter was addressed to him. In a motion to take the case from the jury, the defendants state that the evidence showed that the draft was sent to Cowan, and that he was thus constituted the agent of plaintiff. The evidence not only fails to show the alleged agency, but it shows that the question of agency was wholly immaterial, for the reason that the money in controversy was never paid by Cowan to any one for any purpose, nor was it received by Race.

II. It is insisted, on behalf of appellants, that plaintiff's only remedy is by *mandamus* against the treasurer of Hardin county. But he never received any of the money in controversy, and is not liable for it. *Minneapolis & St. L. Railway Co. v. Becket*, 75 Iowa, 183. It was never passed to the credit of Hardin county, nor used for its benefit. The county is not, therefore, liable for it. *Barnes v. Marshall County*, 56 Iowa, 22. It was made the official duty of Cowan to pay this money to plaintiff. Section 4, ch. 123, Acts 16th Gen. Assem. His failure to do so was a breach of his official bond, for which the defendants are liable.

III. During the progress of the trial the plaintiff introduced in evidence a stipulation, which had been

2. COUNTY treasurer: failure to pay railroad tax: liability.

 Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan.

2. **PROCEDURE:**
 jury trial: re-
 mark of court
 as to effect of
 evidence.

entered into between Hardin county and defendants in another action brought by Hardin county. A witness was afterwards interrogated as to matters contained in that stipulation. In sustaining an objection to the inquiry interposed by defendants, on the ground that the proposed evidence was not competent, the court said, in substance: "I shall hold that by that stipulation defendants acknowledged that there was twelve hundred dollars and interest due the said railroad company that has not been paid." Appellants complain of this remark for the alleged reason that it unduly influenced the verdict of the jury, and in effect instructed them as to what the evidence proved. It may be conceded that the stipulation did not acknowledge an indebtedness as stated by the court. But the remark was not addressed to the jury. There was no real conflict in the evidence as to the fact that the amount named was in fact due the plaintiff. The charge of the court to the jury fairly submitted the question of the indebtedness to their determination. We do not think that, under the facts of this case, any prejudice from the remark of the court of which complaint is made could have resulted to defendants. See *Hall v. Carter*, 74 Iowa, 368.

IV. Appellants insist that the bond on which this action is founded was not intended for the security of plaintiff; that plaintiff has not been injured by the alleged breach; and that defendants are responsible on the bond to Hardin county alone. The case of *State v. Henderson*, 40 Iowa, 242, is relied upon as supporting these claims. The plaintiff in that case sought to recover on the official bond of a county treasurer an amount of money due the state. This court did not determine that the state could not maintain an action on such a bond, but held that the bar of the statute of limitations could not be avoided by the bringing of the action in the name of the state. That decision rests in part upon the fact that the county is liable to the state for the full amount of taxes levied for state purposes, excepting such amounts as are

4. **COUNTY treas-
 urer: bond
 of: who may
 sue on.**

Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan.

certified to be unavailable, double or erroneous assessments; and, in case the county treasurer prove to be a defaulter, the county is required to levy and collect such additional taxes as shall be required to pay the amount of the default in state revenue. Code, secs. 908, 909. There is no provision of that character in regard to taxes collected to aid in the construction of railways. They constitute a special fund, to be paid to the treasurer of the railway company, for whose benefit they were voted, and the county is not liable therefor. Section 4, ch. 123, Acts 16th Gen. Assem.; *Des Moines & M. Railway Co. v. Lowry*, 51 Iowa, 486; *Stone v. Woodbury County*, 51 Iowa, 522; *Butler v. Supervisors*, 46 Iowa, 326; *Barnes v. Marshall County*, 56 Iowa, 20. The bond of defendants was given to the county of Hardin, in the state of Iowa, and was conditioned that Cowan, as treasurer, "shall promptly pay over to the person or officer entitled thereto all money which shall come into his hands by virtue of the said office; and shall promptly account for all balances of money remaining in his hands at the termination of his said office." The money in controversy was collected by Cowan in his official capacity. He neither paid it to the treasurer of plaintiff nor to his own successor. It is clear that there has been a breach of the conditions of his bond. But the county is not liable for the money; hence cannot be required to collect it. Unless plaintiff can maintain this action, it is without remedy, although it has a right which should be enforced. Section 2552 of the Code provides that "when a bond, * * * given to the state or county, * * * is intended for the security of the public generally, or of particular individuals, suit may be brought thereon in the name of any person intended to be thus secured who has sustained an injury in consequence of the breach thereof." In our opinion, that section gives ample authority for the maintenance of this action. We discover no grounds for reversing the judgment of the district court. It is therefore

AFFIRMED.

SMITH V. KNIGHT.

Partnership: ACCOUNTING: DECREE: IMPROPER DIVISION OF CASE.

Action in chancery, brought against an administratrix, to settle a partnership between plaintiff and decedent, the business of which plaintiff continued to carry on after the death of his partner. Plaintiff alleges a written contract for a settlement between himself and decedent, and various mistakes, errors and omissions in the entries in the firm books, and asks affirmative relief. Defendant denies the alleged mistakes, errors and omissions in the books, and alleges other errors and omissions, which, if corrected, would show a large balance in her favor, and she asks that the accounts be settled, and for affirmative relief. The court dismissed plaintiff's petition so far as he demanded affirmative relief, but ordered that the case be retained for the purpose of requiring plaintiff to account for his trust as surviving partner, and made no disposition of defendant's claim for relief on the ground of errors in the books prior to decedent's death. *Held* that it was error thus to split the case, and pass upon plaintiff's evidence, and leave the issues growing out of defendant's claims undetermined,—especially since the determination of such issues was necessary for a proper accounting by plaintiff as surviving partner,—and that the whole case ought to have been determined together; and it is remanded for a new trial accordingly.

Appeal from Boone District Court.—HON. S. M. WEAVER, Judge.

FILED, MAY 18, 1889.

ACTION in chancery to settle a partnership. The relief prayed for by plaintiff was by a decree of the court denied, and the case retained for the purpose of requiring plaintiff, as the surviving partner, to account with the partnership and defendant. The plaintiff appeals.

Phillips & Day, E. L. Green and D. D. Chase,
for appellant.

Crooks & Jordan, for appellee.

BECK, J.—I. The petition alleges that plaintiff and D. R. Knight, in 1869, entered into an oral agreement for a copartnership to erect a steam mill and elevator, and

Smith v. Knight.

to do the business of grinding and buying and selling grain. Under the agreement they were to be equal partners, each furnishing equal portions of the capital of the partnership. The firm did a large business, and there had been no settlement of the accounts of the partnership. June 11, 1884, they entered into a written contract, which recites that there had been no settlement of the partnership business, and each of the partners may have invested in business an amount exceeding his due proportion. The contract provides that as soon as possible the books of the firm shall be inspected, corrected and settled, and that each partner shall be allowed interest upon his monthly balance from the beginning, at the rate the firm may have paid during the time the balances were accruing. It is also provided that interest at the same rate shall be allowed for future balances. January 25, 1886, Knight died, and defendant is his administratrix. Since the death of Knight plaintiff has carried on the business as the surviving partner. It is shown in the petition that at no time has there been a settlement between the partners of their accounts with each other and with the firm. The petition alleges that, while the books of the firm are in the main correct, yet in certain matters and instances they are incorrect, containing entries which they should not contain, and failing to contain entries and charges which they should contain. It is claimed in the petition that monthly balances of the partners' accounts should be taken, and interest charged on them as provided by the written agreement referred to; that the interest which the firm paid the banks was fifteen per cent., the loans renewable at the end of ninety days. It is alleged that there is a mistake in an entry crediting Knight with three thousand dollars for the purchase of lots upon which the mill was built. He should have been credited with eighteen hundred dollars only. A charge against Knight of two thousand dollars is not posted upon the ledger, and does not enter into the accounts of the parties and the firm. Other mistakes and omissions in the books are pointed out. They need not be more particularly referred

Smith v. Knight.

to in this connection. The plaintiff, in his original petition, prays that a referee be appointed, the accounts be settled, each party being charged with the items for which he is liable, and that plaintiff recover \$34,669, the sum due him. The petition presents exhibits showing the monthly balances of the partners as claimed by plaintiff.

The defendant, in her answer, denies the alleged mistakes and errors in the books charged by plaintiff, and alleges that there are mistakes and omissions which, if corrected and entered, would show a larger balance in her favor. She alleges that plaintiff has converted and appropriated to his own use a large sum of money coming into his hands as surviving partner. She admits that there never has been a settlement of the accounts of the partners with each other and with the firm. She prays that the accounts of the concern be settled, and that she be allowed the amount to which she is fairly entitled.

The answer and amended answer, as defense relating to the contract above referred to, deny that Knight signed or executed it, and allege that it is usurious, and therefore void, and that, as no claim was made under it, nor attempt made to enforce it, in the lifetime of Knight, plaintiff is now barred and estopped from all attempt to enforce it. An amended petition sets out other alleged mistakes and omissions in the books, and prays that plaintiff be allowed for them in the final decree. The answer to this amendment denies all the allegations therein, and alleges that the ledger of the firm is correct, except as to one item of near sixteen hundred dollars; that the accounts have never been questioned during the existence of the firm; and that defendant is barred and estopped by the statute of limitations from now questioning the same.

The parties introduced evidence upon the issues evolved by the pleadings, and thereupon the district court rendered the following decree: "It is therefore ordered and adjudged by the court that all of the affirmative relief prayed by plaintiff be denied, and that

Smith v. Knight.

plaintiff's petition, so far as the same relates to such affirmative relief, be dismissed. It is further ordered that the cause be retained for the purpose of requiring the plaintiff to account for his trust as surviving partner of the firm of Knight & Smith, and that plaintiff, Allan Smith, make a full, true and correct account of all his doings as surviving partner of said firm of Knight & Smith. Such account and showing shall be made in writing, and in such detail as shall be necessary to a full, fair and complete exhibit of plaintiff's management of said trust, and the present condition thereof, and shall be on file by the first day of the next term of this court. Defendant may except to or take issue upon such account and showing, and plaintiff shall, if demanded, appear at said term for examination in open court in reference to said trust, or for other or further order, as shall to the court appear just and equitable. Defendant having on the trial waived the plea in abatement to the effect that this action was prematurely brought, such issue is not passed upon herein, but the cause is determined as though such question had not been made. It is further ordered that plaintiff pay the costs of the suits, taxed at ——— dollars. To all of which plaintiff excepted."

II. We are united in the opinion that the district court erred in not completely disposing of the case upon one trial. The decree, without presenting any findings of facts, disposes of whatever in plaintiff's petition may be called a prayer for affirmative relief, and to that extent dismisses his petition. The affirmative relief prayed for was that a judgment be rendered in plaintiff's favor. The allegations as to the contract for a settlement and as to the various mistakes, errors and omissions, are not prayers for affirmative relief. They are averments of facts, upon which plaintiff bases his claim for "affirmative relief." The decree does not pretend to settle the issue raised by defendant; it simply decides that plaintiff is not entitled to affirmative relief. The cause is retained for the purpose of requiring plaintiff to account as surviving partner.

Smith v. Knight.

Now, this decree does not settle defendant's claim as to the correction of the account in a matter of near sixteen hundred dollars. It is obvious plaintiff's "trust as surviving partner" will depend upon the condition of the firm accounts when Knight died. This would require defendant's claim as to the sixteen hundred dollars to be determined. But the district court has made no determination thereof, while the plaintiff's claims have all been cut off. This is the trial of one side of the case at a time. We think all claims of both parties should be considered and disposed of at one time. We do not think the validity and effect of evidence of one party should be disposed of, and the case kept for trial upon issues involving claims of the other party. But, as we understand it, this was done; counsel so regard it. The contract for the settlement, evidence as to mistakes and omissions, and the like, are passed upon as insufficient to support plaintiff's claim for relief, while defendant's claim and defendant's evidence remain unadjudicated. This is erroneous.

III. We have given the case very careful attention, and are not prepared to assent to all of the conclusion upon the evidence which the court below reached. We think the case should not be split for trial. It is a case which demands the attention of a careful referee, who shall present fully the evidence, together with his findings of fact and of law upon all questions arising in the case, if the court below, in the exercise of its discretion, sends it to a referee. We probably could determine the effect of some, possibly all, of the evidence introduced by the parties, and hold that plaintiff is or is not entitled to a decree for relief thereon. But, as the case should be determined upon one trial as to all of the issues, and as to both sides, so that the decree shall fully and completely settle all the rights of all the parties, and as this cannot be done upon the record before us for the reason that the case remains in the court below for trial upon issues involving the rights of both parties, we send the case appealed back for trial

Miller v. Root.

anew. This conclusion is demanded to the end that there may not be more than one trial in the case, which is forbidden by the law. The decree is reversed, and the cause is remanded for proceedings in harmony with this opinion.

REVERSED AND REMANDED.

MILLER V. ROOT *et al.*

1. **Instructions: NOT WARRANTED BY PLEADINGS: NO PREJUDICE.** In an action upon two promissory notes, the defendant pleaded that they were not yet due, on the alleged ground that he had, for a valuable consideration, made an agreement with plaintiff's agent for an extension of time of payment, and that the agent in making said agreement acted with the full knowledge and consent of plaintiff. There was no plea of subsequent ratification, but there was some evidence tending to show a ratification. *Held* that it was error to submit the question of ratification to the jury, but that it was an error favorable to defendant,—since it gave him the benefit of the evidence on that point,—and was no ground of reversal on his appeal.
2. **Agency: CONTRACT FOR AGENT'S BENEFIT.** Where an agent enters into a contract binding his principal, with the full knowledge and consent of the principal, the rule which obtains where the agent contracts as such, upon consideration moving to himself, does not apply.
3. **Jury: MISCONDUCT OF: APPEAL.** This court will not reverse a judgment on the ground that the jury permitted the sheriff and bailiff to communicate with them, where it is not shown that the communications were such that the jury could have been influenced thereby.

Appeal from Des Moines District Court.—HON. J. M. CASEY, Judge.

FILED, MAY 18, 1889.

PLAINTIFF sues to recover balance upon two promissory notes,—one dated September 29, 1878, due six months after date, for one thousand dollars; and one dated September 11, 1879, due on or before two years

77	545
91	570
77	545
95	528
77	545
96	193
77	545
103	316

Miller v. Root.

after date, for two thousand dollars. The defendant Root, answering, admits the execution of said note, and alleges as defense that on or about the fifteenth day of September, 1880, he and the plaintiff, through her agent, E. McKitterick, made a verbal contract, wherein it was agreed that, for a valuable consideration then paid to plaintiff by defendant, plaintiff would extend the time for the payment of said notes for a period of ten years from the dates thereof; that the consideration paid was the procuring and obtaining by defendant of one hundred shares of the capital stock of the Centennial Mutual Life Association of Burlington, Iowa, for the use and benefit of said McKitterick, and the securing and giving to said McKitterick a lucrative position in said association at a large salary, which position was accepted by the said McKitterick, agent for plaintiff; that said McKitterick, as agent for plaintiff, loaned the money to defendant Root, evidenced by said notes, and that McKitterick at the time of making said agreement represented to defendant Root that he had full power and authority to make the same as plaintiff's agent, and to receive said consideration, and that he acted in the premises with the full knowledge and consent of the plaintiff. Defendant avers that said agreement was made, and said consideration paid and accepted, with the full knowledge and consent of the plaintiff; wherefore he says that said notes have not matured, and are not due. The defendant Scarff, answering separately, admits the execution of said notes, and avers that he executed the same as security only for his codefendant, Root; that the plaintiff, at the time of the execution of said notes and ever since, knew that he executed them as such security; that plaintiff and defendant Root, without his knowledge or consent, agreed upon an extension of time, as alleged by the defendant Root. Upon these issues the case was tried to a jury. Verdict for plaintiff, and defendants appeal.

S. L. Glasgow, for appellants

Thomas Hedge and *H. C. Hadley*, for appellee.

GIVEN, C. J.—I. There is no controversy in the testimony but that Scarff signed the notes as surety, and that whatever agreement, if any, was made for an extension of time, was without his knowledge or consent. The only issue, therefore, is as to the alleged agreement for an extension of time. Neither of the answers alleges that McKitterick had general authority, as agent of plaintiff, to make such agreements, nor that, having made the alleged agreements, the plaintiff subsequently ratified the same. The defense alleged is that McKitterick made the agreement and received the consideration as agent for plaintiff, with her full knowledge and consent. The sole issue is whether McKitterick and Root made an agreement substantially as alleged, and, if so, whether it was with the knowledge and consent of the plaintiff. If the defense was based upon an allegation of general authority in McKitterick to make such agreement, or upon a subsequent ratification by the plaintiff, then it would be immaterial whether the plaintiff knew that such an agreement was being made at the time of its making or not; but in the case made in the answers it is material, as the authority of McKitterick is alleged to have been in the fact that he was acting with the knowledge and consent of the plaintiff. The court, after properly directing the jury as to the burden of proof, instructed them: “Before you find for the defendants, or either of them, it must be established by a preponderance of evidence that the agreement to extend the time of payment of said notes was actually made and substantially as alleged, and that Mrs. Miller at the time had knowledge of the terms and conditions of such agreement, and assented to it, or afterwards, with full knowledge of the terms and conditions thereof, ratified the same; and, if the evidence fails to satisfy you of either of these propositions, you should find for plaintiff.” The question of ratification is fully submitted throughout the instructions, except in the fifth. In the fifth instruction the court says: “And if you find from the evidence that the agreement

1. INSTRUCTION:
not warranted
by pleadings:
no prejudice.

to extend payment was made substantially as alleged, then you should determine from the evidence whether or not McKitterick had authority from the plaintiff to make and bind her by such agreement. If he had not, then she is not bound by it; if he had, she is." This instruction ignores the question of ratification. We are of the opinion that, under the pleadings, no claim of subsequent ratification was made, and therefore that inquiry should not have been submitted. There is some testimony tending to show ratification, and that question may have been submitted to the jury in anticipation of amendment conforming the pleadings to the proofs. We do not see that defendants (appellants) were prejudiced by submitting the question of ratification to the jury. It gave them the full benefit of that additional defense, and in a way that the jury could not have been misled or confused. The instructions very plainly and clearly submitted the case upon the inquiries as to whether there was an agreement for extension of time, and, if so, whether the plaintiff at the time had knowledge of the terms and condition of such agreement, and assented to it, or afterwards, with full knowledge of the terms and conditions thereof, ratified the same. Except as to ratification, the case was submitted as made in the pleadings, and the submission of the additional defense of ratification was without prejudice to the defendants.

II. As the defense is upon the grounds that the alleged agreement was made, and the consideration paid and accepted, with the full knowledge and consent of the plaintiff, the principle that applies where the agent contracts as such, upon consideration moving to himself, does not apply. If the agreement was made, and the consideration paid and accepted, as alleged, with the knowledge and consent of the plaintiff, then it is immaterial whether the consideration was to her or to her agent. We see no error in the giving or refusing of instructions, except in submitting the question of ratification, which, as already stated, was without prejudice.

2. AGENCY: contract for agent's benefit.

Forney v. Remey.

III. As to the misconduct of the jury in permitting the sheriff and bailiff to communicate with them, we see nothing in the testimony as to the communications had that indicates that the jury could have been influenced thereby, or that calls upon us to overrule the decision of the district court on that question. It is evident that the statements of these officers were not so broad as represented in the affidavit filed by defendants. Entertaining these views, the judgment of the district court is

3. JURY : mis-
conduct of :
appeal.

AFFIRMED.

FORNEY V. REMEY.

77 549
el30 432

Trust: DEED OF : VALIDITY : TESTAMENTARY IN CHARACTER : GIFT INTER VIVOS. A written instrument transferring personal property to a trustee, who is charged to pay the income therefrom, after defraying expenses, to the grantor so long as she lives, and to make such investments in real estate as she may direct, and at her death to distribute the property in equal shares among her children, is not invalid as being a gift *inter vivos* without delivery, nor as being a testamentary disposition of property not executed as required by law, but is a deed of trust operating *in præsenti*, and therefore valid.

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge

FILED, MAY 20, 1889.

ACTION of replevin to recover the possession of certain promissory notes. Plaintiff shows in his petition that he is entitled to the possession of the notes as the administrator of J. Ellouisa Forney, deceased, and sets up the grounds upon which defendant bases his claim to the possession of the property. A demurrer to plaintiff's petition was overruled, and, defendant refusing to further plead, judgment was rendered against him, and he appeals to this court.

Power & Huston, for appellant.

P. Henry Smythe & Son, for appellee.

BECK, J.—I. The petition alleges that the notes in controversy were the property of plaintiff's intestate, and that defendant claims to hold them under a conveyance which is in the following language: "For and in consideration of the sum of one (\$1) dollar, and the further consideration of the performance and execution of the trust hereinafter referred to by the grantee and assignee hereinafter named, I, Jane E. Forney of Burlington, Des Moines county, and state of Iowa, hereby sell, assign, transfer and convey unto John T. Remey, of the same city, county and state, certain notes, accounts and personal property, a full, correct schedule of which is attached hereto, and made a part hereof, marked 'Exhibit A.' Said assignment and transfer, however, is in trust for the following purposes, viz.: Said John T. Remey shall hold said property, and, after deducting from the interest, rents, income and profit thereof any expenses attending the execution of this trust, shall at least semi-annually pay to me all the interest, rent, income and profit arising from the property hereby assigned, such payments to be made for and during my natural life. It is further agreed and understood that said trustee shall use any money which may come into his hands by virtue of this trust for the purchase of any real estate designated by me; and, if real estate is so purchased, the title to the same shall be taken in the name of said trustee, to be held by him upon the same terms and conditions as the above-mentioned personal property, and at my death all of said property, of whatever kind and character, shall be distributed among the parties hereinafter named as hereinafter provided; and, for the purpose of making such distribution, said trustee is authorized to sell any real estate so acquired by him upon such terms as in his judgment may be for the best interest of the beneficiaries under this trust, and to execute good and sufficient

Forney v. Remey.

conveyances therefor, and shall loan, upon good and sufficient security, any money coming into his hands by reason of this trust. As soon after my decease as can be done without prejudice to the trust fund, said trustee shall distribute said money, and the proceeds arising from any real estate which he may have acquired as herein provided, among my children and the heirs of my deceased son, in equal shares, viz.: One-seventh (1-7) of said property, or the proceeds arising from the sale thereof, shall be paid to each of my following-named sons: Samuel Kelley, Isaac Kelley, Alexander Kelley, Joseph Kelley, Otis Kelley, and one-seventh (1-7) shall be paid to my daughter, Mrs. Eliza Wright, and one-seventh (1-7) thereof shall be paid to the children of my deceased son, David Kelley, viz., Lee Kelley, Willis Kelley, and Daniel Kelley."

Plaintiff alleges in the petition that the conveyance is without consideration and void, being of a testamentary character, and not executed as required by law. The defendant demurred to the petition on the ground that the conveyance set out in the petition is a valid and binding instrument. The demurrer was overruled, and, defendant refusing to further plead, judgment was rendered against him.

II. The determination of this case turns upon the validity and sufficiency of the conveyance of the property in controversy by plaintiff's intestate. Plaintiff insists that it is invalid because it is a testamentary instrument, and, not being executed and proved as required by law, is therefore void. It cannot be doubted that one owning property, real or personal, may transfer and convey it to a trustee, to be held for his own benefit or for other beneficiaries. The terms of the trust may be such as are not forbidden by the law. The instrument in question in this case upon its face is a conveyance in trust for the benefit of the grantor and others, who are the beneficiaries named upon its face.

III. But plaintiff's counsel insist that it witnesses a gift *inter vivos*, and as such is not valid, for the reason that it is testamentary in its character. It is

Forney v. Remey.

plain that the conveyance is not a gift *inter vivos*. The grantor herself is named as the first beneficiary, retaining the power to direct the investment of funds arising from the property. The other beneficiaries can, under the instrument, receive no benefits from the property until after the death of the grantor. Nothing further need be said in order to refute utterly plaintiff's position, that the instrument witnesses a gift *inter vivos*.

IV. Is the instrument a conveyance, operating *in præsenti*, or is it testamentary in its character, taking effect and operating after the death of the grantor? The language of the instrument itself plainly and forcibly answers this question. It transfers the property to defendant, to be held in trust, as prescribed by the terms of the instrument. The property under the instrument passes to defendant, who takes it as a trustee, and holds it subject to the terms of the trust. The title passes to defendant *in præsenti*. It does not await the death of the grantor. She lost ownership and control of the property by the execution of the deed, while, under the law of trusts, she fixed by the terms of the conveyance its future disposition. There is nothing in the conveyance, or the facts connected with it, suggesting an idea of a future power of disposition retained by the grantor. She could not revoke the grant, nor in any way change its terms and conditions. It is not in any sense a testament, nor does it witness a gift *inter vivos*.

V. Counsel on both sides have cited many cases. We think they do not differ as to the rules of the law determining the effect of a testamentary writing, of a valid conveyance in trust, or of an instrument witnessing a gift *inter vivos*. Their contention relates to the character of the instrument before us, whether it be of one or another of the characters named. Now the cases cited by counsel for plaintiff fail to support the position that the instrument in question is not a deed of trust, operating *in præsenti*, and is a testamentary writing, or witnesses a gift *inter vivos*. We do not feel called upon to discuss these cases, pointing out where they

Perkins v. City of Burlington.

fail to support counsel's position. Indeed, we think the cases do not at all tend in that direction. It will be readily seen that we cannot expect to find cases which would hold that a deed of trust in the language of the one before us is not a deed, but a testamentary writing. The instrument, in form and effect, is an absolute and direct conveyance of the property in controversy to defendant, in trust for uses specified therein. Surely it cannot be said that the instrument witnesses a gift *inter vivos*, or is testamentary in character, for the reason that the grantor is a beneficiary during her life, and her heirs or children become beneficiaries after her death. This presents the very gist of the case. We cannot be expected to cite and discuss cases upon the A B C principles of the law involved in the simple facts of this case. The judgment of the district court is

REVERSED.

PERKINS V. THE CITY OF BURLINGTON.

77	553
97	295
77	553
142	13

1. **Taxation: OF UNPLATTED LANDS IN CITY LIMITS.** A tract of eighteen acres, owned by the plaintiff in the defendant city, occupied by plaintiff as his homestead, with the intention of so occupying it indefinitely, and not subdivided by streets or alleys, but surrounded on all sides by land which is platted for city purposes, and having all the benefits of light, water, streets, street railroads and fire protection common to that portion of the city, is subject to taxation for city purposes. (*Fulton v. City of Davenport*, 17 Iowa, 404, and *Brooks v. Polk County*, 52 Iowa, 460, followed.)
2. ——— : ——— : CHAPTER 47, LAWS OF 1876 : INTERPRETATION. In chapter 47, Laws of 1876, authorizing cities and towns to enlarge their limits in the manner therein prescribed, the language used in section four, to the effect that "no lands included in said extended limits which shall not have been laid off into lots of twenty acres, or less * * * shall be taxable for any city purpose," etc., refers only to lands taken in by the extension, and were not designed to affect the taxation of lands lying within the former limits.

Perkins v. City of Burlington.

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, MAY 20, 1889.

THE plaintiff is the owner of eighteen acres of land within the corporate limits of the city of Burlington. In the year 1886 the city authorities assessed said land for taxation, and levied taxes thereon for city purposes. The plaintiff brought this action in equity, to enjoin the city and its treasurer from the collection of said taxes, upon the ground that said land was not subject to city taxes. The cause was submitted to the court upon an agreed statement of facts, and there was a decree dismissing the petition. Plaintiff appeals.

J. W. Blythe, for appellant.

J. J. Seerley, for appellee.

ROTHROCK, J.—I. The land upon which the taxes were levied constitutes the plaintiff's homestead, and it lies within the boundaries of the city, as defined by an act of the general assembly of this state, approved February 14, 1851. No city taxes were levied upon the land until the year 1886. The location and purposes for which the premises have been used are set forth in the agreed statement of facts, as follows: "The aforesaid tract of land is not, and has never been, divided into lots, nor intersected by streets or alleys, but has been used and occupied in one entire tract by the plaintiff as his homestead. About three-quarters of an acre is occupied by the house and a portion of the lawn of the plaintiff; about an acre is occupied by barns and out-buildings and stable-yard, and a small portion is occupied by a house, for the accommodation and residence of the plaintiff's servant, engaged in the care of his domestic animals and other matters about his residence, and from which no rent is

1. TAXATION:
of unplatted
lands in city
limits.

Perkins v. City of Burlington.

now, or ever has been, derived, except as the same has been included in the compensation of the servant for his labor. The remainder of the tract of land is occupied by garden, orchard, and wooded pasture-land. The tract is situated more than one mile from the business center, and a large part thereof is not suitable for subdivision into lots." *Second*. "It is further agreed that the above-described tract of land is not held for speculative purposes, nor with the intention of dividing the same into lots, but that it is, and for many years has been, occupied by the plaintiff and his family as their homestead and residence, and used in good faith, in the manner and for the purposes above set out, and for no other purpose, and with the intention of so continuing." A plat of the land, and that part of the city adjacent to it, is exhibited with and made a part of the agreed statement of facts, from which it appears that the land adjoining plaintiff's, on all sides, is laid out in lots and streets and alleys. There are streets on three sides, and an alley on the other side. An electric light is maintained by the city at the intersection of the streets, at one corner of the land, and the city also lights at public expense a line of gas-lamps upon one of the streets to plaintiff's house. The city water-works extend to plaintiff's residence, and there is a public hydrant in front of his house. A fire station is maintained by the city near the land. Street cars run on two sides, and one block from the land. The city works, and has in reasonably good condition, all the streets surrounding the property; and there is a public school building about two blocks distant. From these facts it would seem that, under the authority of *Fulton v. City of Davenport*, 17 Iowa, 404, and *Brooks v. Polk County*, 52 Iowa, 460, the plaintiff's land is subject to taxation for city purposes. The plaintiff appears to have all the benefits of light, water, streets, railroads and fire stations, which are common to that part of the city which surrounds his land.

II. We have stated that the plaintiff's land is within the boundaries of the city as established in the

2. —: —: year 1851. By chapter 47 of the Laws of
chapter 47, 1876, cities and incorporated towns were
Laws of 1876: authorized to enlarge their limits in the
interpreta- manner therein provided. The enlargement
tion. was to be effected by a vote of the electors of the city or town, upon a proposition to be submitted by the city or town counsel. Section 4 of the act, as amended by chapter 169, Acts of Seventeenth General Assembly, is as follows: "No lands included within said extended limits, which shall not have been laid off into lots of twenty acres or less, or which shall not subsequently be divided into parcels of twenty acres or less, by the extension of streets or alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that they may be subjected to a road tax, to the same extent as though they were outside of the city or town limits, which said tax shall be paid into the city treasury; provided, that the provision of this act shall not apply to cities organized under special charter." The city availed itself of this act, and extended its limits in the year 1876.

It is contended by counsel for appellant that all lands lying within the limits of the city as now defined, if not divided into lots of twenty acres or less, and which have been used in good faith for agricultural or horticultural purposes, are exempt from taxation for city purposes. On the other hand, counsel for appellee claims that such exemption applies only to lands brought within the city by the added territory. The question turns upon the meaning intended by the words, "lands included in said extended limits." We think, taking the whole act together, including its title and considering its object, that the lands referred to mean lands added to the city. The law was enacted for the purpose of enabling cities and towns to enlarge their boundaries. It was no part of its object to limit city taxation in cities as they then existed. It enabled cities, by a vote of the people, to extend their limits and include within the boundaries agricultural lands without the consent of the

The State v. Whitmer.

owners thereof; and it was, no doubt, quite apparent that some means should be provided to protect farming lands from city taxation. There was no demand for protection to the owners of land already within the boundaries of cities. It is true that "within said extended limits" might, in a certain sense, mean within the whole of the territory in the city. But, when considered in connection with the other sections of the statute, it appears to us plain that "said extended limits" was intended to mean the land included in the addition made to the boundaries of the city. It is contended that the legislature must have intended the exemption to apply to all the land in the city as extended, for otherwise there would be one rule of taxation for lands in the extension, and another for the lands within the original limits. We do not think that we should be controlled by this consideration. It appears plain to us that it was not intended to disturb the taxing power over lands already within the city.

AFFIRMED.

77	557
88	328
77	557
97	444
100	508

THE STATE V. WHITMER.

1. **Larceny: POSSESSION OF STOLEN PROPERTY: EXPLANATION: EVIDENCE.** Trial for the larceny of two horses. The horses were in the exclusive possession of the defendant and were traded off by him, within two days after they were stolen. *Held* that it was therefore incumbent on him to make some reasonable explanation of his possession consistent with his innocence, and that, though the evidence was not wholly consistent, it was for the jury to determine its effect, and that this court could not interfere with a verdict of "guilty," on the ground of insufficient evidence. (See opinion for evidence.)
2. **Criminal Law: NEW TRIAL: NEWLY-DISCOVERED AND CUMULATIVE EVIDENCE.** The statute does not authorize a new trial in a criminal case on the ground of newly-discovered evidence (*State v. Bowman*, 45 Iowa, 418), nor in any case, where the newly-discovered evidence is merely cumulative, as in this case. (See opinion for citations.)

The State v. Whitmer.

8. ———: MISCONDUCT OF COUNSEL: APPEAL: RECORD. A complaint that the counsel for the state was guilty of misconduct in argument to the jury, in referring to the fact that the defendant did not testify in his own behalf, in violation of section 8686 of the Code, cannot be considered in this court, where the facts relied upon do not appear in the record; but where the court below refused a new trial on that ground, this court must presume that there was no such misconduct.

Appeal from Pottawattamie District Court.—HON.
A. B. THORNELL, Judge.

FILED, MAY 20, 1889.

THE defendant was indicted, tried, and convicted of the larceny of two horses, the property of one J. B. Fallon. Defendant appeals.

Watkins & Williams, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—I. It is not disputed that two horses, the property of Fallon, were stolen from his pasture near Glenwood, in Mills county, on the night of the seventh of November, 1886. The animals were found in the city of Omaha, Nebraska, on the ninth day of the same month. One of them was in the livery stable of one Brown, and the other in the livery barn of one Demick. It appears from the evidence of D. A. Farrell, who was then sheriff of Mills county, and who found the team in Omaha, and who arrested the defendant at that place, that the defendant admitted that he sold or traded the horses to Brown and Demick within two or three days after they were stolen. When arrested, defendant claimed that he got one of the horses from a farmer, and the other from another person, at a place called "Papillion," and that he did not know either of the persons from whom he got the horses. He gave no description of the persons. The sheriff told defendant that he would

1. LARCENY:
possession of
stolen prop-
erty: expla-
nation:
evidence.

go to Papillion with him, but he expressed no willingness to go, only that he wanted to have his bonds reduced, and go himself. It appears that the case has been twice tried in the court below, and there is nothing in the record showing that the defendant has at any time made any effort to verify his statement that he bought the horses at Papillion or elsewhere.

It will be observed that the property was in the exclusive possession of the defendant very soon after it was stolen. It was therefore incumbent on him to make some reasonable explanation of his possession. One C. Wesley was a witness in behalf of the state, and he testified that he saw a man whom he believed to be the defendant in possession of a team of the same description as the stolen horses, and leading them up Main street, in the city of Council Bluffs, on the morning of November 8, 1886, and that he saw him about nine o'clock that morning at the dummy depot on Broadway, with the same team, and that he took them on the transfer train, which started towards Omaha. This witness was examined upon the preliminary examination, and upon the first trial, and it appears from the record that his testimony upon the last trial, as to identifying the defendant as being the person in possession of the team at Council Bluffs, is not consistent with his testimony given on the first trial, and at the preliminary hearing. And another witness, who was present at the time the team was put upon the transfer, testified that the animals were in possession of a tall man and a short man, and that neither of them was the defendant. Another witness stated that he saw a tall man and a short man in the neighborhood of where the team was stolen on the evening before they were taken. Several other witnesses testified that the defendant was in the city of Omaha on the night in which the horses were stolen.

The principal question presented in argument is that the verdict is not supported by the evidence. We have set out the evidence somewhat in detail, for the purpose of showing that it presented a proper case for the determination of a jury. There is no such absence

The State v. Whitmer.

of evidence of guilt as to warrant the interference of this court. It is true that the witness Wesley did not on the three occasions on which he testified give the same dates at which he claims he saw the defendant in possession of the horses at Council Bluffs, and he did not give exactly the same description of the person as to his clothes, whiskers, etc. But it is quite certain that he saw the team, because the witness for the defendant who was present testified that Wesley was at the dummy train when the horses were shipped. Taking the evidence all together, we are content to let the judgment stand.

II. One ground of the motion for a new trial was based upon alleged newly-discovered evidence. The application was based upon certain affidavits, from which it appears that two witnesses, who were present at the transfer when the horses were shipped to Omaha, will testify that the same were not in the possession of the defendant, and that he was not present at that time and place. This evidence is cumulative. It is of the same kind and to the same point as other evidence which was introduced upon the trial. A new trial will not be granted for newly-discovered evidence which is merely cumulative (*Reeves v. Royal*, 2 G. Greene, 451; *Manix v. Malony*, 7 Iowa, 81; *Morrow v. Railway Co.*, 61 Iowa, 487); and it has been determined by this court that the statute does not authorize a new trial, in a criminal case, upon the ground of newly-discovered evidence, (*State v. Bowman*, 45 Iowa, 418).

III. The defendant was not examined as a witness in his own behalf. It is claimed that the county attorney, in his address to the jury, was guilty of such misconduct as to entitle the defendant to a new trial, because he made the statement to the jury that the defense "did not dare to put the defendant on the witness stand." It is provided by section 3636 of the Code that the fact that the defendant is not introduced as a witness in his own behalf shall not have any weight against him on the trial,

2. CRIMINAL law:
new trial:
newly-discovered and
cumulative
evidence.

3. — : misconduct of counsel : appeal : record.

Stanbrough v. Daniels.

nor shall the attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf, and, if they do so, the defendant shall for that cause alone be entitled to a new trial. But the record does not show that the county attorney violated the section of the statute above referred to. It rather appears that he did not. The court below must have so held, and we think correctly.

IV. It appears to us that the charge given by the court to the jury, and the manner in which the trial was conducted, were fair, and even liberal, towards the defendant, and we discover no reason why the judgment should not be enforced. **AFFIRMED.**

STANBROUGH V. DANIELS.

1. **Appeal: THEORY OF TRIAL BELOW FOLLOWED.** A claim made in this court, in an action to establish and enforce a lien on land, that the defendant and appellant had conveyed her interest in the premises before the action was begun, and that therefore she has no further interest in the controversy, cannot be considered, where it appears from the record that the case was tried below on a contrary theory, and that theory was justified by the pleadings.
2. ———: **REVIEWING DEMURRER: WHAT RECORD MUST SHOW.** A party desiring a review in this court of an order overruling a demurrer should elect to stand upon his demurrer, and have the record so show. It is not sufficient to have general exceptions noted at the end of a decree showing a trial on the merits. (Compare *Wilcox v. McCune*, 21 Iowa, 296.)
3. **Pleading: AVERMENTS OF ANSWER NOT DENIED: EFFECT.** A reply does not necessarily admit the averments of the answer which it does not deny, nor waive the denial made by implication of law. (Compare *Day v. Insurance Co.*, 75 Iowa, 694.)
4. **Mortgage: FORECLOSURE: PARTIES.** One who holds a certificate of purchase of land upon the foreclosure of a junior mortgage is, during the year allowed by law for redemption, only a lien-holder, and is not a necessary party, though a proper one, to the foreclosure of a senior mortgage; and, if no redemption is made, and a sheriff's deed is executed to him, it does not divest the lien of the senior mortgage, though such lien can be enforced against him only after his rights have been adjudicated in the manner provided by law.

77	561
83	707
77	561
85	186
77	561
86	473
77	561
94	420
77	561
96	27
77	561
102	430
77	561
106	91
106	301
77	561
127	455
77	561
131	116

Stanbrough v. Daniels.

§ ——— : ——— : REDEMPTION BY PURCHASER UNDER JUNIOR FORECLOSURE: TERMS OF: EQUITY. Where two mortgages made and filed at the same time on the same land, and which were therefore co-ordinate liens (*Koevenig v. Schmitz*, 71 Iowa, 186), were foreclosed, and the sheriff held a special execution on each, but sold on one only, and plaintiff bid the whole amount due on both, including costs, and the sheriff applied the surplus, after paying the execution on which he sold, to the satisfaction of the other execution, *held* that, though this may have been irregular, it accomplished just what equity would have decreed, and therefore a court of equity rightly refused to disturb it, on the complaint of a purchaser under a junior foreclosure, that the surplus should have been paid to her; also, that the court, in an action to fix the terms and limit the time of redemption by her (she not having been made a party to the foreclosures), properly ordered that, to effect such redemption, she should pay the whole amount bid by plaintiff, with ten per cent. thereon from date of payment, not excepting the costs made in the foreclosure of the senior mortgages.

Appeal from Delaware District Court.—HON. J. J. NEY, Judge.

FILED, MAY 20, 1889.

ACTION in equity to foreclose a lien on real estate, and to fix and limit the time of redemption therefrom by defendant. A decree was rendered for plaintiff as prayed, and defendant, Lucy Daniels, appeals.

Henderson, Hurd, Daniels & Kiesel and Blair, Dunham & Norris, for appellant.

Powers & Lacy and Yoran & Arnold, for appellee.

ROBINSON, J.—The petition of plaintiff states that H. P. Chapman and wife, on the twenty-second day of March, 1882, executed on the land involved in this action two mortgages, both of which were recorded at the same hour in the proper records of Delaware county; that one was in favor of Emma Chase, and the other in favor of Enos Yoran; that actions were brought for the foreclosure of these mortgages by the respective mortgagees in the district court of Delaware county, and a decree of foreclosure rendered in favor of the plaintiff

Stanbrough v. Daniels.

in each case on the fifteenth day of February, 1887; that the parties then appearing of record to be the holders of liens on said land were not made parties to either action; that the land was sold to plaintiff on the twelfth day of September, 1887, by virtue of a special execution issued on the decree in favor of said Emma Chase; that at the time of said sale the sheriff who made it held for collection a special execution issued on the decree in favor of said Enos Yoran; that on said sale plaintiff bid the amount required to satisfy both of said executions; that he is now owner of the sheriff's certificate of sale; that he is also the owner of a decree of foreclosure rendered in favor of Mary E. Kent and against said Chapman, which is a lien on a portion of said premises senior to the liens of the two mortgages described and foreclosed as aforesaid, and that the interest thereby created is not merged in said junior decrees; that defendant, Lucy Daniels, claims or appears to have of record some interest in said premises, but such claim or interest is junior and inferior to said liens of plaintiff. The petition asks that the said lien of plaintiff be foreclosed as against said defendant, and that her equity of redemption be fixed and limited as provided by law, not extending beyond September 12, 1888, and that general equitable relief be given. By an amendment to his petition the plaintiff alleges that the defendant, Lucy Daniels, executed a deed to one Susan E. Daniels the day before the petition in this case was filed, "conveying, or purporting to convey," all her right, title and interest in said premises to said grantee, and makes the latter a party defendant. An answer was thereafter filed by Lucy Daniels, which does not deny any material averment of the amended petition. It alleges that on the sixteenth day of February, 1886, plaintiff obtained a decree of foreclosure against Chapman, which authorized a special execution against the said premises; that such execution was issued, and the premises sold thereunder on the twenty-second day of March, 1886, to the plaintiff; that after that sale, and before the suits of Chase and Yoran were commenced, a junior lien-holder

Stanbrough v. Daniels.

paid to plaintiff the full amount of the certificate of sale, and became entitled to demand the sheriff's deed to be issued thereon; that the right to demand such deed was duly assigned to said Lucy Daniels, to whom a deed was issued in due form on the seventh day of April, 1887; that neither said defendant nor her assignee was a party to the Chase and Yoran foreclosure proceedings. To that answer plaintiff filed a reply, in which it was alleged, in substance, that said defendant was estopped from asserting a right in said premises superior to the liens of plaintiff, for the reason that the decree through which she claims title duly recognizes such liens to be superior to said decree. To the reply said defendant filed a demurrer, which was overruled. The decree recites the filing of the demurrer and the ruling thereon, and shows that evidence was introduced by the plaintiff. At the end of the decree is a statement as follows: "To all of which the said Lucy Daniels excepts," but the record does not show any other exception by her, nor does it show that she elected to stand upon her demurrer. The decree provided that unless redemption was made from the sale of September 12, 1887, on or before September 12, 1888, by the payment of the full amount represented by the certificate of sale, then all right of defendant to the premises should be barred and forever foreclosed.

I. It is insisted by appellee that the record shows that appellant sold and conveyed her interest in the premises in controversy before this action was commenced, and that in consequence she has no further interest in the matters in controversy. It is true that appellant does not allege in terms that she has or claims an interest in said premises, and that the amendment to the petition, which is not denied, avers that the day before the petition was filed appellant "executed a deed to one Susan E. Daniels, conveying or purporting to convey" all her right and title to the premises. But the petition also charges that appellant "claims or appears to have of record" some right or title to the premises, and that, not being

1. APPEAL: theory of trial below followed.

Stanbrough v. Daniels.

denied by the answer, must be taken as admitted. The reply of plaintiff as originally filed contained a division which pleaded that appellant had fully conveyed her interest in the premises before the petition was filed. Appellant thereupon moved that she be dismissed. Pending the motion, that division of the reply was withdrawn, and the motion was then overruled. It is clear that the cause was tried in the court below on the theory that appellant had some right or title to the premises, and made some claims thereto, and we are of the opinion that the pleadings justified that course.

II. Appellant has assigned errors with the view of having the ruling of the district court on the demurrer reviewed. It is claimed by appellee that no exception to such ruling was taken, and that appellant did not elect to stand on her demurrer. The general exception noted at the end of the decree indicates that exceptions to all rulings set out in the decree were taken. But that is not sufficient for the purposes of appellant. She should have elected to stand on her demurrer, if she desired to preserve her rights thereunder, and the record should have shown that fact. The taking of an exception was not sufficient. *Wilcox v. McCune*, 21 Iowa, 296. We fail to discover any indication in the record that appellant elected to stand on her demurrer, while it appears that there was a trial on the merits. The alleged errors involved in the overruling of the demurrer must therefore be disregarded.

III. The evidence offered on the trial in the court below has not been certified and made of record as required by law. Some alleged evidence is set out in the record by various means, but it cannot be considered. Notwithstanding that fact, appellant asks a reversal of the decree, and insists that the pleadings show that it is erroneous; that the answer admits most of the allegations of the petition, and sets out certain matters in defense; that these matters are admitted by the reply; and that the facts so admitted are sufficient to show that the decree should

2. —: reviewing demurrer: what record must show.

3. PLEADING: averments of answer not denied: effect.

be reversed. The reply does not, however, necessarily admit the averments of the answer which it does not deny, nor waive the denial made by implication of law. *Day v. Insurance Co.*, 75 Iowa, 694. The reply in this case admits, for the purpose of the pleas in estoppel, that appellant claims title by virtue of a certain decree, a copy of which is set out, and a sale by virtue of a special execution issued to satisfy the same; but it is not such an admission of a material fact as shows the decree in this case to be erroneous.

IV. If it be conceded that the averments of the answer are substantially admitted for all the purposes of the case, as claimed by appellant, then

4. **MORTGAGE:**
foreclosure: we are justified in finding from the plead-
parties. ings, the admissions of appellant, and the presumptions as to what was established by the evidence in which we must indulge, that the material facts of the case are substantially as follows. Both parties claim through H. P. Chapman. He had executed a first mortgage on a part of the premises in controversy, which was assigned to Mary E. Kent. It was foreclosed, and the decree of foreclosure was assigned to plaintiff, who now holds it as a separate claim against a part of the premises. No sale has been made by virtue of it. Chapman afterwards executed two other mortgages, one of which was in favor of Emma Chase, the other being in favor of Enos Yoran. Those mortgages were executed at the same time, were recorded at the same hour, and were foreclosed on the same day. Neither was senior to the other, and the premises were held for the payment of both. *Koevenig v. Schmitz*, 71 Iowa, 176. Chapman executed a fourth mortgage, which was foreclosed, and the premises were sold by virtue of a special execution issued to satisfy the decree of foreclosure. There was no redemption from that sale, and appellant became the holder of the title conveyed by the sale and sheriff's deed. The decree under which she claims was rendered on the sixteenth day of February, 1886. Mary E. Kent and others were made parties defendant in the action in which it was rendered, and the liens of all, excepting

that claimed by Mary E. Kent by virtue of the first mortgage executed by Chapman, were decreed to be junior to the lien of the plaintiff in that action. Whether her lien was senior or not was not determined. Chase and Yoran were made parties to that action, but it was dismissed as to them without an adjudication of their rights. The premises were sold March 22, 1886, to the plaintiff in this action. Appellant thereafter became the owner of the rights conferred by the sheriff's certificate of sale, and received a sheriff's deed on the seventh day of April, 1887. Neither appellant nor her assignee were made parties to either of the actions for the foreclosure of the Chase and Yoran mortgages, although their interests were shown of record. The actions last named were commenced after the premises in question were sold to appellant's assignees, but the decrees therein were rendered before appellant was entitled to a sheriff's deed. The premises were sold by virtue of the special execution issued to satisfy the Chase decree on the twelfth day of September, 1887, or after the sheriff's deed to appellant had been duly executed and recorded. At the time of said sale a special execution to satisfy the Yoran decree had been issued and levied upon the premises, but no sale was made thereunder. Plaintiff bid for the premises an amount sufficient to satisfy both executions, and the price he paid was so applied. It is insisted by appellant that the proceedings to foreclose the Chase and Yoran mortgages were illegal, for the reason that she or her assignor was the owner of the sheriff's certificate of sale when the actions were commenced, and when the decrees were rendered; that she was so far the owner of the premises as to be a necessary party to the foreclosure proceedings. That she was a proper party may be admitted, but we are of the opinion that she was not a necessary party. She was not in possession of the premises, nor was she entitled to such possession. Her interests could have been terminated at any time prior to the twenty-third day of March, 1887, without her consent, and without bringing her into court, by a redemption from the

 Stanbrough v. Daniels.

sheriff's sale, made as provided by law. Until she became entitled to a deed her claim was in the nature of a lien, and there was no more necessity for making her a party to the suits in question than there was for making any other lien-holder such a party. When the sheriff's deed was executed to her she became entitled to the possession of the premises, and was then owner, subject, however, to the liens of the several mortgages and decrees under which plaintiff now claims. Her ownership did not divest those liens, although they can be enforced against her only after her rights have been adjudicated in the manner provided by law. This action was brought to determine those rights, and to fix a time within which she can redeem, and we are of the opinion that it can be maintained. We must presume that the evidence sustained the decree as to priorities of the liens in controversy.

V. It is insisted by appellant that the amount fixed by the decree for her to pay in case she redeems

is excessive. The amount so fixed is the
 5. —: —: redemption
 by purchaser amount for which the premises sold, with
 under junior interest thereon at ten per cent. per annum
 foreclosure: from date of sale. The theory of plaintiff
 terms of: is that, as she was the owner of the land
 equity.

when the sale was made, the amount realized from it in excess of the sum required to satisfy the Chase mortgage should have been paid to her, and should not have been applied in satisfaction of the Yoran execution. It may be that the proceedings in question were not entirely regular, but they accomplished just what a court of equity would have decreed. *Koevenig v. Schmitz, supra*. The special executions were designed to enforce liens which were in all respects equal excepting as to amounts. Plaintiff bid the amount necessary to satisfy both for the purpose of extinguishing both liens. An equitable result having been reached, a court of equity will not disturb it. It is further said that appellant should not be required to pay the expenses of the foreclosure proceedings and sale, but they were legitimate results of senior liens, of which she had notice when she

Wilson v. Yocum.

acquired her interest. The original mortgage debts were merged in the decrees, and they were satisfied by the sale to plaintiff. We think he is entitled to recover the amount fixed by the decree.

VI. The conclusions we have reached make a consideration of other questions presented by counsel unnecessary. The time within which redemption may be made from the sale of September 12, 1887, is extended for the period of ninety days next following the filing of this opinion. In other respects the decree of the district court is

AFFIRMED

WILSON V. YOCUM.

77	589
136	678

1. **Vendor and Vendee : FAILURE OF CONSIDERATION : INSTANCE.** Plaintiff deeded lands to defendant in consideration of defendant's deeding to him other lands, and of defendant's promise to erect valuable improvements on his other lands adjoining those deeded to plaintiff, whereby those deeded would be enhanced in value. *Held* that a failure to make such improvements was a failure of consideration for which plaintiff could maintain an action.
2. **—— : FALSE REPRESENTATIONS : INSTANCE.** Defendant induced plaintiff to make an exchange of lands with him by falsely representing that a railroad was about to be built with a depot near the lands deeded to plaintiff, and that the railroad company had purchased a large tract of land lying near to the land so conveyed, and that he had his information from the manager of the road. *Held* that these representations were not the mere statements of opinion, but the assertion of pretended facts, and that an action would lie for the recovery of the damages sustained by the fraud. (See opinion for citations.)
3. **—— : FAILURE OF CONSIDERATION : SPECULATIVE DAMAGES : WHAT ARE NOT.** Where defendant exchanged real estate with plaintiff, and as a part of the consideration for the land deeded by plaintiff he agreed to make certain valuable improvements upon lands adjoining those conveyed to plaintiff, but failed to do so, and plaintiff, in an action to recover for the failure, alleged that the lands conveyed by him were worth eight thousand dollars, and that the lands conveyed to him, with the improvements made as agreed, would have been worth eight thousand dollars, but without them were worth only three thousand dollars, *held* that his damages, as shown by his petition, were actual and not speculative, and that an action would lie therefor. (*McDole v. Purdy*, 28 Iowa, 278, *followed*; *First Nat. Bank v. Thurman*, 69 Iowa, 693, *distinguished*.)

Wilson v. Yocum.

Appeal from Plymouth District Court.—HON. SCOTT
M. LADD, Judge.

FILED, MAY 20, 1889.

ACTION at law to recover on account of the partial failure of the consideration of a contract to convey lands, and for fraudulent representations inducing the contract. A demurrer to the petition was sustained. Plaintiff appeals.

Martin & Gaynor, for appellant.

Argo & McDuffie, for appellee.

BECK, J.—I. In view of the fact that questions in the case involve the sufficiency of the petition, it becomes necessary to set it out quite fully. The parts material to the decision of the case are in these words: “Comes now the plaintiff, and for cause of action says that on or about the first day of August, 1887, the plaintiff and the defendant herein entered into a verbal agreement, by the terms of which plaintiff agreed to convey to defendant certain real property situated in Plymouth county, Iowa, to-wit: * * * That the defendant, in consideration therefor, agreed to convey to the plaintiff the following described real estate, in the town of Lucerne, in the county of San Diego, California, to-wit: * * * And, as further consideration for the land agreed to be conveyed to him by plaintiff, promised and agreed to make improvements on land owned by him in the vicinity of the property so agreed to be sold to plaintiff, to-wit: To cause to be erected a large nail factory, terra-cotta works, a large hotel building, and to build a large building, in which would be opened a bank, with a capital of one hundred thousand dollars; and to erect, and to cause to be erected, many other large and substantial buildings on land then owned by him, the said defendant, in the immediate vicinity of the said lots, the erection of which would have very materially increased

Wilson v. Yocum.

the value of the said lots so sold to plaintiff; and further represented and agreed, as an inducement to said contract, that a railroad company had selected and located its depot on lots near said land, and pointed out to plaintiff where said depot would be located, and where the track of the railroad would be laid, and further represented that he had his information from the managers of said road; and that the same would be completed within three months from said date; and further represented, to induce plaintiff to enter into said agreement, that the managers of said railroad, the name of which plaintiff cannot now give, had purchased three hundred acres of land immediately adjoining plaintiff's lots. That in pursuance of said agreement and representations, and in reliance thereon, plaintiff did, on or about said date, execute and deliver to defendant good and sufficient deeds for said land in Plymouth county, Iowa. That in part performance of his said agreement defendant executed and delivered to plaintiff deeds for said lots. That the agreed value of said land deeded by plaintiff to defendant was eight thousand dollars over and above encumbrances, and the said land was and actually is worth said sum. That the estimated value of said lots, with improvements so erected and built, was eight thousand dollars. That if the defendant had built and caused to be erected the buildings and improvements as he agreed with plaintiff to do, as herein set out, and if the representations by defendant had been true, the said lots would have been worth the sum of eight thousand dollars. That without said improvements said lots were not worth to exceed three thousand dollars. That at the said time defendant was the owner of a great portion of said town of Lucerne, and had the control of the entire town-site, and represented to plaintiff that he had almost unlimited means at his command for the use and purpose of improving, building up and advancing the same. That all of defendant's promises, agreements and representations herein set out were wholly false, and made for the purpose of cheating and defrauding plaintiff. That defendant has

Wilson v. Yocum.

failed, neglected and refused to make any of the improvements agreed by him to be made, and has absconded and left the state of California. That defendant knew at the time he made said representations that they were false, and made them for the purpose of inducing plaintiff to pay more for said land than the same was worth. That plaintiff relied upon said representations, and was thereby induced to make said trade. That by reason of the facts herein set out plaintiff has been damaged in the sum of five thousand dollars. That the defendant is a non-resident of the state of Iowa. That, by reason of the facts herein set out, there is now due and owing plaintiff from defendant the sum of five thousand dollars, no part of which has been paid. * * *

To this petition defendant demurred in the following language: “(1) Said petition does not state facts sufficient to entitle him to the relief demanded, or any other relief, in this: That there is no averment in plaintiff’s petition that the defendant made any false or fraudulent statement or representations to plaintiff respecting the lots mentioned and described in said petition. All the statements set out in plaintiff’s petition, and which are averred to be false and fraudulent, amount to nothing more than a promise on the part of the defendant that he would make the improvements mentioned in said petition upon his own property at some time in the future, or they relate to a condition of things about the truth of which the plaintiff had the same opportunity for obtaining correct information as the defendant; and there is no averment with respect to these alleged false statements in said petition that defendant fraudulently did anything to induce plaintiff to forbear inquiry as to the truth of such alleged fraudulent statements. (2) That the alleged fraudulent misrepresentations or statements are wholly immaterial, in that they do not relate to any ascertainable fact as distinguished from matters of opinion, intention, probability or expectation, and they are therefore not fraudulent in law. (3) Representations, to induce a vendee to purchase property, to be fraudulent, must relate to a present or past state of

facts, and relief, as for deceit or for fraud, cannot be obtained to a non-performance of a promise or other statement looking to the future. (4) The alleged false representations relied upon by plaintiff in this case do not relate to the subject-matter of the contract set out in the plaintiff's petition, but do relate solely to collateral matters of mere inducement, and they are therefore insufficient in law. (5) The damages claimed in the plaintiff's petition are wholly speculative, and are too uncertain and remote."

II. Attention to the petition will disclose the fact that it seeks to recover on two grounds:

(1) The failure of defendant to make certain improvements which were a part of the consideration for the land conveyed by plaintiff to defendant. These improvements were to be made on defendant's land, but would enhance the value of the land conveyed by defendant to plaintiff. It cannot be doubted that a contract for such improvements, which would enhance the value of plaintiff's land, is a valuable consideration for plaintiff's contract to convey the Iowa lands. He did convey these lands, and defendant did fail to make the improvements. He can recover for the breach of this contract. The petition sets out a cause of action based upon this breach of contract.

(2) But the petition alleges false representations inducing the purchase of the land. We think these representations are a ground of recovery, and that the demurrer should not have been sustained as to them, had it been limited thereto. Surely the false and fraudulent representations as to the construction of a railroad and other matters, which are not merely the statements of an opinion, but the assertion of facts which induced the contract on plaintiff's part, are ground for an action to recover the damages sustained by the fraud. See *McDole v. Purdy*, 23 Iowa, 277; *Wilson v. Railway Co.*, L. R. 9 Ch. 279; 2 Suth. Dam. 250-252.

1. **VENDOR and vendee: failure of consideration: instance.**

2. **—: false representations: instance.**

Wilson v. Yocum.

III. The petition may have been obnoxious to the objection of mingling without separation distinct causes of action. But it was not assailed on that ground.

IV. The fifth ground of demurrer, that the damages are wholly speculative, and are too uncertain and remote, is overcome by consideration of the allegations of the petition that the land purchased by plaintiff, with the improvements contemplated in defendant's contract, would be worth eight thousand dollars; without them, but three thousand dollars. Plaintiff by these allegations shows that he suffered damages to the amount of five thousand dollars. These are not speculative damages, but under the allegations of the petition are actual damages, based upon the alleged differences in the value of the property, with and without the improvements. See *McDole v. Purdy*, 23 Iowa, 278; *Wilson v. Railway Co.*, L. R. 9 Ch. 279. This case is distinguished from *First Nat. Bank v. Thurman*, 69 Iowa, 693, by its facts. The future construction of the manufactories and other buildings which defendant contracted should be built pertain to the consideration of the purchase of the lots by plaintiff, who paid the price at which the lots were estimated, relying upon defendant's contract to construct the manufactories, which would largely increase the value of the property. The lots were purchased by plaintiff at the price of eight thousand dollars, for the reason that plaintiff relied upon defendant's contract to increase the value of the lots. The petition alleges that the lots, without the construction of the manufactories, were worth but three thousand dollars, and with them were worth eight thousand dollars. Defendant's contract is valid, and plaintiff is attempting to enforce it in this action. He declares upon it in the petition. If he establishes the contract, and the breach thereof, what will be the measure of his damages? Clearly, the difference between the value of the lots, in case defendant should perform his contract, and their value if the contract should not be performed.

3. — : failure
of considera-
tion : specu-
lative dam-
ages : what
are not.

It will be seen that this is not a case of speculative damages, but rather a case requiring the assessment of the damages for the non-performance of a contract, which were contemplated by the parties when they entered in the contract. If the damages be held speculative, and on that account plaintiff cannot recover, the contract would be defeated; for plaintiff could not recover for the breach thereof, by which he avers in the petition he lost five thousand dollars. Courts will not in this way defeat remedies upon contracts. In *First Nat. Bank v. Thurman*, 69 Iowa, 693, the damages held to be uncertain and speculative were not based upon the consideration of the contract attempted to be enforced. The defendant agreed to erect a building, provided the plaintiff would first erect another building, and, in case of failure of defendants so to do, he was to forfeit five hundred dollars. Plaintiff in the case sought to recover the five hundred dollars, and alleged that it was damages by the depreciation of the value of the property, which was worth five hundred dollars less that it would have been worth had defendant performed his contract. The damages claimed are based upon the alleged depreciation of the value of plaintiff's building, and not upon any alleged consideration arising out of the increased value of the building. The damages were wholly speculative and uncertain. But in this case no other damages were or could have been contemplated by the parties than those claimed by plaintiff. They are alleged in the petition as being actual and certain, so that plaintiff suffered loss in the sum of five thousand dollars by defendant's violation of his contract. As shown by the allegations of the petition, they are not speculative or uncertain, and are based upon allegations of value. We are united in the conclusion on this as well as other points of the case, but some of the judges think that the doctrine of *Bank v. Thurman, supra*, cannot be harmonized with the ruling in this case. In our opinion, the judgment of the district court ought to be

REVERSED.

FERGUSON V. THE FIRMENICH MANUFACTURING
COMPANY.

1. **Waters: RIGHTS OF UPPER AND LOWER OWNERS ON STREAM.** The lower owner of land upon a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome condition as a reasonable and proper use of the stream by the upper owner will permit. What is a reasonable use must be determined from the circumstances of the case.
2. ——— : **LIABILITY OF UPPER OWNER CONTRIBUTING TO POLLUTION.** Where the upper owner contributes to the pollution of a stream already polluted from above, but what he contributes makes the water unfit for stock, and charges it with noxious gases, when before it was fit for stock and free from such gases, he is liable to the lower owner in damages. (See *Platt v. Railway Co.*, 74 Iowa, 181; *Ewell v. Greenwood*, 26 Iowa, 877.)
3. ——— : **POLLUTION BY BOTH UPPER AND LOWER OWNERS: LIABILITY.** The lower owner on a stream cannot recover of the upper owner for polluting it, when he himself pollutes it also, and thus contributes to the very injuries of which he complains. (See cases cited in opinion.)
4. ——— : **POLLUTION OF STREAM BY UPPER OWNER: MEASURE OF DAMAGES.** Where the upper owner, by the unreasonable use of a stream, pollutes it, so that the water, as it flows upon the farm below, is not only useless for stock and domestic purposes, but also is a source of sickness, pain and discomfort to the lower owner and his family, he is entitled to recover not only the difference in the rental value of the farm on account of the nuisance, but also such special damage as he may have suffered, including that resulting from sickness, pain and discomfort. (See cases cited in opinion.)

Appeal from Marshall District Court.—HON. S. M.
WEAVER, Judge.

FILED, MAY 20, 1889.

ACTION to recover damages alleged to have been caused by the wrongful acts of defendant in polluting a stream of water. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

J. L. Carney, for appellant.

J. F. Meeker and *Caswell & Meeker*, for appellee.

ROBINSON, J.—Plaintiff is the owner of four hundred and twelve acres of land, through which Linn creek flows from the southwest in a northeasterly direction, into the Iowa river. He resides upon this land, and uses it in part as a stock and dairy farm. The defendant operates a glucose factory, situate on the creek aforesaid, about half a mile southwest of the farm of plaintiff. Sheds for feeding cattle are located near the factory, and are used in connection with it. Plaintiff claims that in the years 1886–87–88 the defendant caused to be discharged into the creek, from its factory and cattle-sheds, large quantities of acids, poisons, manure and other filth, in consequence of which the water flowing therein was so polluted that it could not be used for stock or domestic purposes; that in consequence of such discharges the water of said creek emitted unwholesome and noxious vapors and odors; that by reason of the said acts of defendant the plaintiff and his family suffered and became sick, the products of his dairy were greatly injured, and the use of his farm, and stock thereon, were greatly damaged; that before said acts of defendant were committed the said stream furnished excellent water, which was used by plaintiff for his stock, and for domestic purposes; that said stream furnishes the only running water on his farm; and that the said acts of defendant were wrongful. Defendant denies these claims of plaintiff, and alleges that the creek has for years taken and received the drainage and sewage of the southern and eastern part of Marshalltown, including that from slaughterhouses located thereon, factories, fat-rendering establishments, outhouses and other sources of filth, and that, in consequence its water becomes unfit for use. Defendant further claims that the contamination of the water, and the vapors and odors of which plaintiff complains,

are due to a slaughter-house which is maintained on his land, and for which he is responsible. The evidence shows that during the year 1887 the water of Linn creek, from a point above the glucose factory, to its confluence with the Iowa river, was in a foul and unwholesome condition, and that noxious odors were exhaled therefrom. Some of the evidence tended to show that acts authorized by defendant contributed largely to produce that condition. There was also some evidence which tended to show that plaintiff was partially responsible for the evils of which he complains.

I. The relative rights of the upper and lower owners of lands intersected by a stream of water were considered to some extent in the case of *Spence v. McDonough*, ante, p. 460. We said in that case that the lower owner has the right to have the water which flows from the land of an upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit. The upper owner will not be allowed to poison or corrupt the stream. Washb. Easem. 332; 1 Hill, Torts, 601. In many cases he may use all of its water, to supply what are termed his natural wants, as for household purposes and for his stock, but cannot appropriate it all for so-called artificial purposes, as for manufacturing, to the damage of a lower owner. Washb. Easem. 330; Gould, Waters, sec. 205. The upper owner may, as a rule, use the stream in a reasonable manner, for reasonable purposes, even as a means of carrying off waste matter. Whether the use to which he wishes to devote it is reasonable must be determined by the circumstances of the case. Washb. Easem. 326; Gould, Waters, sec. 206.

II. It is claimed by appellant that Linn creek, above the farm of plaintiff, has been used as a common sewer by the city and inhabitants of Marshalltown for many years, and was so used during the time in question; that in consequence of such use its water was polluted and rendered unfit for domestic purposes and for stock,

1. WATERS :
rights of up-
per and lower
owners on
stream.

2. — : Liability
of upper
owner con-
tributing to
pollution.

Ferguson v. The Firmenich Manuf. Co.

and that defendant, at most, only contributed to the results of which plaintiff complains. But, if that be true, it would not relieve defendant from liability in this action. The right to so use the stream is not shown to exist. Plaintiff owned the land involved in this suit before such use of the stream was made, and had a vested right in it, of which he has not, so far as is shown, been deprived. If the claim of defendant be true, it could not escape responsibility for the wrong because others contributed to it. But plaintiff contends that, although the water of the creek had been somewhat contaminated by the sewage of the city and other causes, yet it was, and would have been, good for stock, and would have been free from noxious odors, but for the acts of defendant. Some of the evidence tends to support this claim, and, if it be well founded, the plaintiff should recover. Code, sec. 3331; *Platt v. Railway Co.*, 74 Iowa, 131; *Ewell v. Greenwood*, 26 Iowa, 377; Wood, Nuis., sec. 445.

III. In November, 1885, plaintiff leased, for the purpose of putting a slaughter-house thereon, a small tract of ground near his dwelling and on Linn creek "with the privilege of the creek." There was evidence to the effect that a slaughter-house was constructed under the lease and operated during 1887; that much animal matter was thrown therefrom into the creek, and permitted to corrupt its water; that other animal matter was thrown about the slaughter-house and there permitted to decay; that the slaughter-house was a nuisance, for which plaintiff was in part responsible, and that to that source, and other causes due to him, much of the evil of which he complains is attributable. The responsibility of plaintiff for the condition of the stream and the odors in controversy was put in issue by the answer. Appellant sought to establish that responsibility during the trial, and asked an instruction in regard to it, which was refused. The court charged the jury that "if it appears that the offensive exhalations complained of were caused by the act or omission

3. —: pollution
by both upper
and lower
owners: liability.

of plaintiff himself, or by others, acting without the co-operation, connivance or assistance of the defendant, then he cannot recover anything on account of such alleged annoyance or disturbance in the comfortable use and enjoyment of his premises ;'' but it failed to charge them as to the effect of contribution by plaintiff to the results of which he complains. It is insisted by appellee that he is entitled to recover, if a wrong has been proven, notwithstanding the fact that he may have contributed to it. We do not think his position is well taken. If he contributed to the wrong, he and defendant were joint wrongdoers. In law, the act of each was the act of both. It was said in *Turner v. Hitchcock*, 20 Iowa, 318, that there is no contribution among tortfeasors who have all knowingly committed a wrong, and that the damage is not severable or apportionable between them. See, also, 1 Hill, Torts, 176, note 3 ; *Metz v. Soule*, 40 Iowa, 238 ; *Cassady v. Cavenor*, 37 Iowa, 300. It is true, the answer charges that the damage of which plaintiff complains was the result of his own act in maintaining a slaughter-house ; but it also sets out various alleged acts of plaintiff which were contributory in their nature ; and the efforts of defendant during the trial were largely directed to showing contribution on the part of plaintiff. The instruction in regard to contribution asked by defendant was objectionable in some respects, but it directed attention to that issue, and an instruction in regard to it should have been given. Acts of plaintiff sufficient to defeat his recovery would be such as contributed to cause those things of which he complains. If he has sustained damage from the wrongful acts of defendant to which he did not contribute, then he should recover therefor. The evidence seems to show that different portions of plaintiff's farm were devoted to different uses. Some of his stock was kept in a field between the slaughter-house on his premises and the factory and sheds of defendant. It may be that the alleged wrongful acts of plaintiff did not affect the water of the stream so far up as that field, and that he would be entitled to recover as to that and

Ferguson v. The Firmenich Manuf. Co.

the cattle kept therein, or, if his acts did not contribute to the odors in controversy he may be entitled to recover the damage caused by them, the liability of defendant being established; but he cannot recover for a wrong for which he is in whole or in part responsible. Field, Dam. 21.

IV. The court charged the jury as follows: "If you find for the plaintiff, the measure of his recovery will be the difference, if any, between the fair and reasonable value of the use of his premises as they would have been without the alleged nuisance, and the fair and reasonable value of said premises with the alleged nuisance, with such other and further sum as will fairly and reasonably compensate him for the bodily sickness, pain and discomfort which he has suffered (if from the evidence you find he has suffered any) by reason of the nuisance or offensive exhalations from the creek occasioned by defendant's wrongful act in contaminating it, if such wrongful contamination has been proved." It was clearly erroneous, and probably the result of an oversight, to charge the jury that the measure of plaintiff's recovery would be the difference between the value of the use of the premises in one case and the value of the premises in the other. It is contended by appellant that depreciation in rental value of the premises is not a proper measure of remedy in the case; that the measure would be the expense of watering stock from a well, or putting in a windmill, or replacing the supply of water by other means. But plaintiff complains of a nuisance which affected the use and enjoyment of his home and farm. The loss of water was only a part of the damage he claims to have sustained. In such cases the depreciation in rental value may be considered. *Randolf v. Town of Bloomfield*, ante, p. 50; *Shively v. Railway Co.*, 74 Iowa, 170; *Loughran v. City of Des Moines*, 72 Iowa, 384.

V. It is further urged by appellant that plaintiff is not entitled to recover for bodily sickness, pain and discomfort, and that the portion of the charge quoted is erroneous in permitting

4. —: pollu-
tion of stream
by upper
owner: meas-
ure of dam-
ages.

THE SAME.

McCormick Machine Co. v. Jacobson.

recovery for them. We held in *Randolf v. Town of Bloomfield, supra*, that the person injured was not limited in his recovery to the damages sustained by reason of the depreciation of the rental value of the property affected by the nuisance, but that he was also entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and family. In *Loughran v. City of Des Moines, supra*, we decided that recovery might be had for loss of time and expense incurred by reason of sickness, in addition to the depreciation in rental value of the premises. It is the policy of the law to allow to the injured party full compensation for all injuries sustained. *Randolf v. Town of Bloomfield*, and cases therein cited. Following that rule, we conclude that there may be a recovery for such special damages as plaintiff may have suffered, including that resulting from sickness, pain and discomfort. Code, sec. 3331; *Ellis v. Railway Co.*, 63 Mo. 131; 3 Suth. Dam. 415-417; *Kearney v. Farrell*, 28 Conn. 320.

VI. Complaint is made of the action of the court in giving other portions of the charge, and in refusing to give instructions asked by defendant. What we have already said indicates our views on the questions thus raised. Other questions discussed by counsel may not arise on another trial. For the errors pointed out the judgment of the district court is

REVERSED.

THE MCCORMICK HARVESTING MACHINE COMPANY v.
JACOBSON.

1. **Evidence: CROSS-EXAMINATION.** Evidence elicited in cross-examination, and which is in no manner and to no extent connected with the evidence given by the witness upon his examination in chief, is properly stricken out. (See opinion for instance.)

McCormick Machine Co. v. Jacobson.

2. **Promissory Note: CONSIDERATION: BURDEN OF PROOF.** Where in an action upon a promissory note the defendant relies upon a failure of consideration, he has the burden to establish such defense, since all written contracts import a consideration. (Code, sec. 2118.)
3. **Instructions: AS TO FACTS GENERALLY KNOWN.** The price of mowers at a certain time, and the condition of the weather and the roads, are not facts resting in the knowledge of all men, and of which a jury may take notice without evidence; and an instruction to the contrary effect was properly refused.
4. **Attorney's Fees: TAXATION: AFFIDAVIT.** Chapter 185, Laws of 1880, requiring an affidavit to be filed before an attorney's fee is taxed, does not relate to contracts made before it took effect.
5. **Attachment: APPEAL: DISSOLUTION BY OPERATION OF LAW.** Where there is judgment against the plaintiff in an attachment case, and he fails to appeal within two days thereafter, the attachment is dissolved by operation of law. (Code, secs. 3019, 3020); and where the cause is remanded for a new trial, which results in a judgment for plaintiff, it is error to order a special execution for the sale of the attached property.

Appeal from Story District Court.—HON. JOHN L. STEVENS, Judge.

FILED, MAY 20, 1889.

ACTION upon a promissory note. There was a judgment on a verdict for plaintiff. Defendant appeals. The case has before been in this court. See 73 Iowa, 546.

George A. Underwood, for appellant.

O. L. Binford and J. H. Bradley, for appellee.

BECK, J.—I. The questions raised by defendant will be considered in the order of their presentation by counsel, and the facts involved in each will be stated in our consideration thereof. A witness for plaintiff, who signed the note as a witness to defendant's signature, after having testified that he saw defendant sign the note, was asked upon cross-examination if he had on the same day any other transaction with defendant. He replied that he sold

1. EVIDENCE:
cross-exami-
nation.

 McCormick Machine Co. v. Jacobson.

defendant a mower for sixty-five dollars. This evidence was stricken out, as not being properly elicited upon cross-examination. This ruling is the ground of defendant's first objection. We think it is clearly correct. The evidence elicited by the question in no manner and to no extent was connected with the evidence given by the witness upon his examination in chief.

II. The district court held, by instructions to the jury, that the burden of proof was on defendant to show that the note was without consideration.

8. PROMISSORY
note: con-
sideration:
burden of
proof.

Counsel for defendant insist that the burden rested on plaintiff to show that there was a consideration for the note. All contracts in writing import a consideration. Code, sec. 2113. A signature to a written instrument is deemed genuine and admitted in evidence without proof, unless it be denied in a pleading under oath. *Id.* sec. 2730. It is plain that, if the signature be established, the instrument imports a consideration. The plaintiff may recover, unless a want of consideration is found. The defendant in this case pleaded two defenses: (1) That the signature to the note was not made by him; (2) that there was no consideration for the note. There is no question as to the burden of proof of the signature. It rests on plaintiff. When the signature is established by proof, as well as admitted by a failure to deny it, the note is deemed valid, and under Code, section 2113, implies a consideration. The plaintiff, upon the issues in this case, could have relied upon the evidence introduced to prove the signature genuine. The jury were authorized to find that there was a consideration, in the absence of proof that there was none. If, therefore, there was no proof as to consideration offered, plaintiff was entitled to recover. It therefore clearly appears that the burden of proof as to the consideration rested on defendant, and not on plaintiff.

III. The defendant requested the court to give an instruction in the following language: "Facts which

8. INSTRUCTIONS:
as to facts
generally
known.

are notoriously known, and within the knowledge of the jury, as well as others in general, need not be proved, but may be

McCormick Machine Co. v. Jacobson.

taken notice of by the jury without being proved." This instruction was refused, whereof defendant now complains. The facts to which the instruction relates, which defendant claims were within the knowledge of the jurors, and known by people generally, are claimed to be the price of mowers when the note in suit was given, and the condition of the weather and the roads. These are not facts resting in the knowledge of all men, which may be considered without proof. No rule of law sanctions the instructions asked by defendant.

IV. Counsel complains on the ground that an attorney's fee was taxed without the affidavit required by section 3, chapter 185, Acts of Eighteenth General Assembly. The act applies to contracts made after it took effect. Section 2. The note in suit was made before.

V. The district court ordered a special execution against the real estate attached in the action. Of this defendant complains, claiming that under Code, sections 3019, 3020, an appeal in the case not having been taken within two days after the judgment, the attachment was dissolved by operation of law, and therefore no special execution could have been issued for the sale of the attached land. The position is well taken. The sections of the Code just referred to provide that in case of the discharge (dissolution) of an attachment, or a judgment in the action against the plaintiff, the discharge of the attachment is final, unless the plaintiff appeal in two days. The attachment is discharged without a special order of court so declaring, the judgment against the plaintiff operating to dissolve the attachment without any further order of the court. *Harger v. Spofford*, 44 Iowa, 369; *Ryan v. Heenan*, 76 Iowa, 589. The district court erroneously ordered a special execution to be issued for the sale of the land. The judgment of the district court, except as to the order for the special execution, is affirmed. It is therefore

MODIFIED AND AFFIRMED.

WISE V. WILDS *et al.*

77	586
77	594
77	586
83	540
77	586
115	782
77	586
135	290

1. **Appeal: FROM CORRECT DECISION BASED ON WRONG REASON: INSTANCE.** In an action against a sheriff by a chattel mortgagee for seizing and selling the mortgaged property upon execution against the mortgagor, the mere fact that the district court gave as a reason for its judgment for defendant that the chattel mortgage was a part of a transaction which amounted to a general assignment, when the true reason was that the conveyances were void as fraudulent, but not possessing all the elements of a general assignment, does not entitle the plaintiff to a reversal; but if the established facts support the judgment, it should be affirmed. (See cases cited in opinion.)
2. **Fraudulent Conveyance: PREFERENCE OF CREDITORS: BADGE OF FRAUD: EVIDENCE.** Debtors have the right to prefer creditors, and to secure them, and the fact that they are relations makes no difference; but when a creditor, a relative of the debtor, seeking security, lends his aid so far as to become trustee for other creditors who are also relatives, but who are not expecting such favors, and are ignorant of the transaction, and the transaction is attended with other suspicious circumstances, it requires very satisfactory explanation, or it stands as a badge of unfair dealing. And, in consideration of the evidence in this case (see opinion), *held* that it justified the finding of the district court that the chattel mortgage in question, made by the debtors to their father-in-law, to secure him and other relatives, to the exclusion of other and more distant creditors, was fraudulent, because its purpose was, in part at least, to delay and defeat other creditors.

Appeal from Jones District Court.—HON. J. H. PRESTON, Judge.

FILED, MAY 20, 1889.

ACTION on the official bond of the defendant Wilds, as sheriff, alleging a breach of the conditions thereof. There was a judgment for the defendants, and the plaintiff appeals.

W. C. Gregory, Graham & Cady and Sheean & McCarn, for appellant.

Ellis & McCoy, Ezra Keeler and Remley & Ercanbrack, for appellees.

GRANGER, J.—The case was tried to the court without a jury, and the court found the following facts :

“(1) That on and prior to April 19, 1886, E. W. Haight and Chas. Haight were partners under the firm name of Haight Bros.

“(2) That said Haight Bros. and one P. J. Whittemore were partners under the name of Haight Bros. & Co.

“(3) That both of said firms did business in the same building, in Oxford Junction, Jones county, Iowa.

“(4) That April 19, 1886, at Maquoketa, Iowa, E. W. Haight for said firms executed chattel mortgages as follows : One to plaintiff for \$3,310.39, purporting to secure note to plaintiff for twenty-two hundred dollars, note to Ira Carter for three hundred dollars, and four notes to Dean Bros. & Lincoln for two hundred and seventy-five dollars, \$159.63, one hundred and fifty dollars, and one hundred and fifty dollars, respectively, with eight per cent. interest, upon the stock of goods, books of accounts, notes and accounts, and fixtures, including counters and shelving, also bake-oven, tools and dishes belonging to Haight Bros.,—being exhibit A, in evidence; also one chattel mortgage to James E. Arnold for five hundred and twenty dollars, purporting to secure one note for five hundred and twenty dollars, with ten per cent. interest, upon same property, subject to plaintiff's mortgage,—being exhibit B; also chattel mortgage from Haight Bros. & Co. to I. C. Weed for \$1,858.75, purporting to secure one note to said Weed for three hundred and fifty dollars, one for four hundred dollars, one for two hundred dollars to Geo. W. Tubbs, one for one hundred and fifty dollars to D. C. Clary, and the further sum of \$1,028.75, on account of borrowed money upon the stock of goods, books of accounts, and accounts and notes, of said mortgagors—being exhibit number 3.

“(5) That at the same time and place said E. W. Haight executed to his wife, B. B. Haight, a warranty

deed of house and lot in Maquoketa, being exhibit number 2, for the stated consideration of nine hundred dollars.

“(6) That on February —, 1886, said E. W. Haight executed to Mrs. Indiana Wise, wife of plaintiff, a deed of a house and lot in Onslow, Jones county, Iowa, for the stated consideration of seven hundred dollars, being exhibit —.

“(7) That said transfers embrace all the property of said firms, and the individual members thereof, and were executed in contemplation of insolvency, which was known to all of said mortgagees.

“(8) That at the time of the execution of said chattel mortgages and deed to B. B. Haight, plaintiff, I. C. Weed, E. W. Haight and the attorney who prepared them, were the only persons present; that the items entering into the consideration of the said instruments were fully talked over, and known well to the parties present.

“(9) That Ira Carter and Dean Bros. & Lincoln, named in plaintiff's chattel mortgage; also Geo. W. Tubbs and D. C. Clary, named in Weed's mortgage, were neither of them present, nor did they know of their execution, or contemplated execution, until after they were executed.

“(10) That said chattel mortgages were all placed in plaintiff's hands immediately after their execution, and the same evening brought by him to Anamosa, Jones county, Iowa, for record, and all filed for record at 8:45 o'clock p. m. of that day, and the recorder directed to mail them to plaintiff at Oxford Junction; that plaintiff then went to Oxford Junction, and on the twenty-first of April took possession of the property described in said mortgages before they were returned to him by the recorder, and on said twenty-first of April, after so taking possession, Haight Bros., by E. W. Haight, transferred and assigned, 'for value received,' to plaintiff, all of the books of accounts and accounts and notes named in his mortgage.

“(11) That plaintiff is the father-in-law of said E. W. Haight; that I. C. Weed is the uncle of the Haight brothers, and step-father of said Whittemore; that Jas. C. Arnold is a cousin of the Haight brothers.

“(12) That plaintiff and said Weed resided in Maquoketa, April 19, 1886.

“(13) That, aside from said claim against Haight Bros., plaintiff is practically insolvent, and was so on April 19, 1886.

“(14) That between April 19 and May 24, 1886, plaintiff sold of said goods seven hundred and two dollars worth, and received the money therefor; that the amount of the notes and accounts so assigned to him was ‘rising’ of two thousand dollars.

“(15) That defendant Wilds is sheriff of Jones county, Iowa, and the other defendants are sureties on his official bond; that said sheriff on May 24, 1886, levied upon so much of the said stock of goods of said Haight Bros. as is shown by the return on said executions named in the petition, and was notified by plaintiff of his claim of ownership, and said sheriff demanded and received indemnifying bonds of the execution plaintiffs, with sureties approved by him, and filed the same with the clerk, and proceeded to sell sufficient of same property to satisfy said executions, costs and a landlord’s lien, and which he returned fully satisfied.

“(16) That in the taking of the Jas. C. Arnold mortgage the same I. C. Weed acted as the agent of said Arnold.

“(17) That the said Haight Bros., besides the sums secured by said mortgages, were indebted in the sum of between two thousand dollars and three thousand dollars, and were insolvent.

“(18) That the amount of the notes and accounts assigned to plaintiff by Haight Bros., as aforesaid, together with the money received from the sale of goods, exceeds the amount of plaintiff’s claim named in said mortgage.

“(19) That, at and prior to all of said conveyances and transfers, the plaintiffs in said executions were creditors of said Haight Bros.

“(20) That the said conveyances and transfers were not made in good faith, and with the sole object of security primarily, but to accomplish a preference, and place the property beyond the reach of creditors not sustaining friendly and confidential relations with the debtors.

“As conclusions of law I find:

“(1) That by the acts and intent of the parties at the time of the making said several transfers, the same amounted to a general assignment of the property of said firms, who were insolvent, and were made in contemplation of insolvency, with a view to give a preference to the creditors named, and were not for the benefit of all the creditors of said firms, and hence, invalid.

“(2) That the claim of plaintiff, Wise, by the assignment of the said notes and accounts to him, and appropriation of said money received on sale of goods, was extinguished prior to the levy on the property by the sheriff.

“(3) That judgment should be entered for defendants, which is accordingly done.”

I. It will be observed that the alleged wrongful act of the defendant is the seizure of the goods on the execution, and taking them from the plaintiff, as the mortgagee of Haight Bros. and Haight Bros. & Co. It will also be observed that the district court found that the several conveyances by the mortgagors amounted to a general assignment for the benefit of creditors by an insolvent, and that the assignment was void because not for the benefit of all the creditors. The action is at law, and is only triable here on the assignments of error, and among others, the question is presented that the legal conclusion has no support in the facts found by the court. Looking to the twentieth finding of fact, the court finds that the transaction, as between the parties to it, is fraudulent, not being designed as security, but to place the property beyond the reach of creditors. With this fact established, it is not important to inquire as to whether or not the particular facts would justify the

1. APPEAL: from
correct decision
based on
wrong reason:
instance.

legal conclusion that the acts amounted to an assignment for the benefit of creditors, with preferences. An assignment for the benefit of creditors, where preferences are given, is invalid, because it is fraudulent, and it is the fraud that vitiates the transaction; and hence the finding by the court that it was a general assignment, but not for the benefit of all the creditors, is merely a finding of the fact of fraud. The mortgagees in the case act with a part of their creditors who are preferred, and the fraudulent purpose is mutual. The plaintiff is one of the parties who thus acted, and is a direct party to the fraud. These observations are, of course, based upon the theory that the findings of fact by the court have support in the testimony, which will be hereafter considered. The mere fact that the district court gave as a reason for its judgment for defendants that the act of the debtors amounted to a general assignment, when the true reason was that the conveyances were void as fraudulent, but not possessing all the elements of a general assignment, does not entitle the plaintiff to a reversal, but, if the established facts support the judgment, it should be affirmed. Code, sec. 3194; *Jamison v. Perry*, 38 Iowa, 14; *Whiting v. Root*, 52 Iowa, 292; *Roberts v. Corbin*, 28 Iowa, 355; *Gilmore v. Ferguson*, 28 Iowa, 422. Under the finding of facts by the district court, we think its judgment for defendants has ample support.

II. The pleadings in the case present several issues for trial, and the introduction of testimony necessarily took a wide range. With the holding in the first division of the opinion, it will not be necessary to inquire as to whether there was error in the finding of the fact of fraud, or in the proceedings leading thereto.

2. FRAUDULENT conveyance : preference of creditors: badge of fraud: evidence.

Under the issues as presented, testimony was competent to show (1) that the plaintiff's claim was paid before the levy by the defendant; (2) that the transaction amounted to a general assignment for the benefit of creditors, with preferences; (3) that the conveyances were fraudulent as against creditors. It will be unnecessary

to consider a number of the assignments as to error in admitting and refusing testimony, because not bearing on the question of fraud. The plaintiff in this suit is father-in-law to E. W. Haight, one of the firm of Haight Bros., and also of Haight Bros. & Co.. It is not to be questioned from the testimony of the plaintiff himself that these firms, at the time of the execution of these conveyances, were both insolvent, and were attempting in some manner to dispose of all their property; that they were being pressed for payment; and that the plaintiff was prompted to take his security because he knew of this insolvency; and that others were anxious about their claims. The mortgagees were all in some manner related to the mortgagors. The mortgages were all made on the same day, and the plaintiff the same evening took them all to Anamosa, and filed them for record, and they were all to be returned to him. Some of the parties secured by the mortgages were not present, and had no knowledge that their claims were to be secured. There was about the transaction much to excite suspicion as to its fairness. It is not for us to say that the testimony is sufficient to satisfy us of the fraud, but is it such that the court below could legally thus find? and in that respect we think it is. It is unquestionably the law that the parties have the right to prefer creditors, and secure them, and the fact that they are relations makes no difference. The instances are few in which good-faith transactions to secure one party involves the giving of security to parties not asking it; and the creditor seeking security in good faith seldom lends his aid so far as to become a trustee for creditors not expecting such favors; and when it does occur, with other suspicious circumstances, it requires quite satisfactory explanation, or it stands as a badge of unfair dealing. A circumstance in the case worthy of notice in this respect is this: The court finds that the claim of the plaintiff had been paid off before this levy. Appellant says in argument that, even if this be true, still he stands as trustee of the other beneficiaries in the mortgage, and is entitled to recover on that account. Conceding this as a legal proposition, but looking to his

Arnold v. Wilds.

actual purpose in the transaction, the court is led to inquire, if his claim is paid, why is he in court seeking to recover beyond the amount of his trust claim? That his personal claim is paid hardly admits of a doubt, and, if true, there is reason to believe that he is looking to interests other than his own in the management and care of this property or its proceeds.

We have examined the record as to the errors assigned, and in some instances, under the issues as presented, we think there was error, both as to admissions and exclusions of testimony. But, looking to the question which we assume as a controlling one, we find nothing which we think could have prejudiced the plaintiff. In fact, we have considered the matter almost, if not entirely, on the conceded facts as to details from which the ultimate fact of the fraud could be found. To consider the separate assignments as to rulings upon the introduction of testimony would extend the opinion to an unreasonable extent, and we think it unnecessary. To our minds the findings by the court have such support in the testimony that, like the verdict of a jury, they are conclusive as to the facts. With the fact of fraud established, the transaction as to plaintiff was void, as found by the district court, and its judgment must be

AFFIRMED.

ARNOLD V. WILDS *et al.*

Wise v. Wilds, ante, p. 586, followed, which see.

Appeal from Jones District Court. — HON. J. H. PRESTON, Judge.

FILED, MAY 20, 1889.

ACTION on the official bond of the defendant Wilds, as sheriff, alleging a breach thereof. There was a judgment for the defendants, and the plaintiff appeals.

Stanhope v. Swafford.

W. C. Gregory, Graham & Cady and Sheean & McCarn, for appellant.

Ellis & McCoy, Ezra Keeler and Remley & Ercanbrack, for appellees.

GRANGER, J.—The issues and facts in this case are so nearly identical with the issues and facts in the case of Wise against the same defendants (*ante*, p. 586) that it is controlled by the law as therein announced, and the judgment of the district court is

AFFIRMED.

77	594
117	611

STANHOPE V. SWAFFORD *et al.*

Attachment: GROUNDS FOR: PROPERTY OBTAINED UNDER FALSE PRETENSES. Defendants induced plaintiff to purchase land worth \$640 for the sum of \$2240, by falsely representing to him that the land was worth the larger amount,—plaintiff never having seen the land. Plaintiff brought this action to recover the difference between said sums as his damages for the false representations. *Held* that such action was well grounded (see cases cited in opinion), and that an attachment was properly issued upon a petition stating such facts, under the twelfth subdivision of section 2951 of the Code, providing that an attachment may issue where “the debt is due for property obtained under false pretenses.”

Appeal from Buchanan District Court.—HON. JOHN J. NEY, Judge.

FILED, MAY 21, 1889.

ACTION to recover the difference between the actual value of land purchased by the plaintiff of defendants and the value as shown by representations of defendants, inducing plaintiff to buy the land, which were false and fraudulent. An attachment was issued upon the grounds shown therefor in the petition,

Stanhope v. Swafford.

which, upon motion of the defendants, was subsequently dissolved. Afterwards a judgment upon a verdict for plaintiff was rendered. From the order dissolving the attachment plaintiff appeals.

Woodward & Cook, for appellant.

Lake & Harmon, for appellees.

BECK, J.—I. The petition alleges that defendants sold to plaintiff three hundred and twenty acres of land for twenty-two hundred and forty dollars; that the plaintiff had never seen the land, and was induced to make the purchase by representations of defendants as to its quality, showing it to be worth the price paid for it, and that these representations were false and fraudulent. It is alleged that the land is really worth no more than six hundred and forty dollars. Plaintiff claims to recover sixteen hundred dollars. The judgment in the case in favor of plaintiff was in the sum of \$1,551.36. Before trial the defendants moved the court to dissolve the attachment on these grounds: “(1) That the allegations of the petition filed herein show that the statement of the cause for such attachment was and is untrue; (2) that said petition shows on its face that the alleged cause for said attachment did not exist at the time the writ was issued; (3) that it is apparent from the allegations of the petition that the writ of attachment should not have issued.” The motion was sustained. The ground of attachment, alleged in the petition, is that the debt which this suit is brought to recover is for property obtained under false pretenses, which is the twelfth cause of an attachment prescribed by Code, section 2951, authorizing attachments to be issued in actions upon prescribed grounds therefor being shown in the petitions.

II. Counsel for defendants insist that the claim or cause of action upon which plaintiff's suit is based is not a debt due for property obtained by false pretenses. We understand that the motion is based upon

Stanhope v. Swafford.

this position. The petition alleges false representations and pretenses, inducing a purchase by him for twenty-two hundred and forty dollars of property really worth no more than six hundred and forty dollars. Plaintiff thus sustained loss and damage to the extent of sixteen hundred dollars if he should retain the property purchased, as he is, by the law, authorized to do.

Under familiar rules of the law which will be recognized by the profession without the citation of authorities, defendants, having received pecuniary advantage from the misrepresentations and false pretenses, are liable in a civil action as for a debt; the plaintiff being authorized to waive the right of proceeding as for a tort, and to sue for the loss and damage he sustained. The defendants in that case are liable for such loss and damage, and their liability is a debt arising on the implied promise which the law raises that they will pay the loss suffered by plaintiff. See *Warner v. Cammack*, 37 Iowa, 642, and *McDole v. Purdy*, 23 Iowa, 277. The debt to recover for which this action is brought "is due for property obtained under false pretenses." Code, section 2951, par. 12. The attachment was therefore rightly issued, and should not have been dissolved. These considerations dispose of all questions in the case. The judgment of the district court is

REVERSED.

GAAR, SCOTT & CO. v. HART *et al.*

Fraudulent Conveyance: VOLUNTARY IN PART: LIABILITY TO CREDITORS OF GRANTOR. Where the consideration of a conveyance made by a debtor was sixteen hundred dollars and one thousand dollars only was paid, and in an action to charge the land with the debts of the grantor it was claimed that he owed the grantee six hundred dollars, but it appeared that such debt, if it ever existed, was barred by the statute of limitations, and had been ignored by the parties in business transactions long before the conveyance in question, *held* that as to the six hundred dollars the conveyance should be considered voluntary, and constructively fraudulent, and that the land to that extent should be subjected to the grantor's debts, though the grantee was not a party to any actual fraud in attempting to delay or hinder the creditors of the grantor.

Appeal from Jasper District Court.—HON. DAVID RYAN, Judge.

FILED, MAY 21, 1889.

THIS is an action in equity, by which the plaintiffs seek to subject certain real estate, the legal title to which is in the defendant Elizabeth Hart, to the payment of a judgment had by the plaintiffs against the defendant James H. Hart. There was a decree subjecting part of the property to the payment of six hundred dollars of the judgment. The defendants Elizabeth Hart and James H. Hart appeal, and claim that no part of the real estate should be subject to the payment of any part of the judgment. The plaintiffs appeal because the whole of the judgment was not established as a lien against all of the land.

Winslow & Varnum, for appellants.

Harrah & Myers, for appellees.

ROTHROCK, J.—I. The defendant James H. Hart was the owner of eighty acres of land in Jasper county, and the defendant Elizabeth Hart owned an adjoining

77	597
91	638
77	597
100	370
77	597
109	276
77	597
134	246

eighty-acre tract. She is the widow of Isaac M. Hart, deceased, who was brother of James H. Hart. I. N. Hart, a son of Elizabeth Hart, bought a threshing-machine and traction engine of the plaintiffs in 1884, and gave his notes for the purchase money, and James H. Hart signed the notes as surety. After the notes were made James H. Hart sold and conveyed his land to Elizabeth Hart. The whole eighty-acre tract was not sold and conveyed at one time. There were separate sales of the two government forty acres, which composed the whole tract. The plaintiffs reduced their notes to judgment, and they claim that said sales and conveyances were fraudulent as to them. The court below held that the sale of one of the forty-acre tracts was a valid transaction, but that the sale of the other was a mere voluntary transfer, and without consideration as to six hundred dollars of the pretended purchase money.

As to the plaintiffs' appeal, we think the decree should be affirmed without question. It appears from the evidence that Elizabeth Hart paid the full consideration for the forty-acre tract which she first purchased. The contract price for the forty acres which she afterwards purchased was sixteen hundred dollars. The evidence satisfactorily shows that she paid one thousand dollars of the purchase money in cash. There is no evidence that she was an active participant in any scheme to defraud the creditors of James H. Hart. On the other hand, it appears that all the money she paid to James H. Hart was used by him to pay his creditors, and not to defraud them. But six hundred dollars of the consideration for the last purchase were not in fact paid. It is true the parties to the sale and purchase claim that James H. Hart was indebted to Elizabeth Hart in the sum of six hundred dollars on account of certain buildings and improvements she had put upon the land. But any claim for these improvements had long before been barred by the statute of limitations, and in a number of business transactions between the parties after the erection of the buildings, and before

 Whitton v. Fuller & Wagner.

the purchase of the land, the claim for improvements was not recognized, nor was any account taken of it. We think the court rightly held that such a claim ought not now to be recognized, and that to that extent the conveyance was merely voluntary; and, as its direct effect was to prevent the plaintiffs from collecting their judgment, to that extent it was a constructive fraud. We do not think that the evidence warrants a finding that there was any actual fraudulent intent on the part of Elizabeth Hart; but where a conveyance is voluntary, it may be impeached as fraudulent by the creditors of the grantor without showing actual fraud on the part of the grantee.

AFFIRMED.

 WHITTON V. FULLER & WAGNER.

Appeal: JURISDICTION: DEFECTIVE ABSTRACT. This court has no jurisdiction of a cause brought up from the district court where the abstract fails to show that an appeal was taken to this court.

Appeal from Marshall District Court.—HON. S. M. WEAVER, Judge.

. FILED, MAY 21, 1889.

ACTION to recover for grain stored in defendants' warehouse. Judgment for plaintiff, and defendants appeal.

Henderson & Hargrave, for appellants.

O. L. Binford and J. H. Bradley, for appellee.

GRANGER, J. —The abstract in this case sets out the pleading; a stipulation of facts on which the cause was submitted below; the judgment of the district court; and an assignment of errors. It contains no words whatever with reference to an appeal or a submission of the cause to this court. Arguments of counsel are on file, but they do not give to this court jurisdiction. There is no record upon which to base a judgment here, and the proceeding as to this court is

DISMISSED

77	599
98	42

77	599
138	719

77 600
124 455

LYONS V. VAN GORDER.

1. **Evidence : RECORD OF TOWNSHIP CLERK : ORIGINAL PAPERS LOST.** The appraisement of damages caused by trespassing animals, made by the township trustees and filed with the township clerk, having been lost, and that fact shown, *held* that the record of the original, made by the clerk, was properly admitted as evidence for defendant, though the clerk testified that he might have given the original to a former attorney of defendant, who had since died,—there being nothing to show that it was received by such attorney on behalf of defendant.
2. **Trespassing Animals: APPRAISEMENT OF DAMAGES BY TOWNSHIP TRUSTEES : JURISDICTION.** Where one who distrains a trespassing animal gives the statutory notice to the person who has charge of the animal, as well as to the one having charge of the farm on which it is usually kept, it is sufficient, under sections 1543, 1544 of the Code, to give the township trustees jurisdiction to appraise the damages done by the animal, though the owner has not been notified.
3. **—— : WHEN NOT TO BE TREATED AS ESTRAYS.** Where defendant took up a trespassing mare, and did not know who her owner was, but did know who had charge of her, and where she was kept, *held* that she was not an estray, within the meaning of the statute, and was not to be so treated.
4. **New Trial: INSTRUCTIONS : EXCEPTIONS.** A new trial is properly refused on the ground of error in an instruction not excepted to when given, and as to which no ground of objection is stated in a motion for a new trial, though it is therein alleged to be erroneous.

Appeal from Allamakee District Court. — HON.
CHARLES T. GRANGER, Judge.

FILED, MAY 21, 1889.

ACTION to recover possession of specific personal property owned by the plaintiff, and damages for its detention. There was a trial by jury, and a verdict and judgment for defendant. The plaintiff appeals.

F. S. Burling, for appellant.

Dayton & Dayton, for appellee.

ROBINSON, J.—The property in controversy is a mare which was detained by defendant for trespassing on his premises. He notified the agent of plaintiff of the distraint within twenty-four hours after it was made, and requested him to pay the damages, and take the mare away. The request not having been complied with, the township trustees were notified by defendant to appear and assess the damages caused by the mare. They met accordingly, and assessed the damage at twenty-five dollars, and taxed the costs at \$15.25. Defendant claims the right to hold possession of the mare by virtue of the distraint and the proceedings of the trustees.

I. The award of the trustees was proven by the introduction of the record of the original, made by the township clerk. Plaintiff objected to the record introduced, on the ground that it was not the best evidence. The law required the trustees to file their assessment with the township clerk, to be of record in his office. The township clerk testified that he did not have the original; that he had searched the records of his office for it, but had been unable to find it. We think this showing was *prima facie* sufficient to permit the introduction of a copy of the original. It is true, the clerk testified that he thought he had handed the original to a former attorney for defendant, who was then dead, but he did not seem to be at all certain that he had in fact handed it to him, and, if he did, it does not appear that it was received by the attorney on behalf of defendant.

II. It is claimed by appellant that defendant failed to show that the notice necessary to give the trustees jurisdiction to make an assessment had been given to plaintiff. The statute provides that notice shall be given to the owner of stock distrained, and that such owner may be the person entitled to the present possession of the stock, and also the person having charge or care of the same, as well as the person having the

1. EVIDENCE:
record of
township
clerk: orig-
inal papers
lost.

2. TRESPASSING
animals:
appraisement
of damages by
township
trustees:
jurisdiction.

 Lyons v. Van Gorder.

legal title thereto. Code, secs. 1453, 1454. The evidence in this case tends to show that one Hinman had charge of the mare for plaintiff when the distraint was made; that he was duly notified of the distraint, but refused to take any action; that he was informed that the trustees had been requested to meet to consider the matter, and that the person who had charge of the farm on which the mare was usually kept was also notified of the same facts. We are of the opinion that sufficient notice of the meeting of the trustees was given to authorize them to act.

III. Appellant insists that defendant should have treated the mare as an estray, because her owner was not known when she was distrained. It is true defendant testified that he did not know who her owner was, but he knew who had charge of her, and where she was kept, and only seemed to be uncertain as to whether she was owned by plaintiff or by his agent. Under these circumstances, the mare should not have been treated as an estray.

IV. Appellant complains of the giving of the sixth paragraph of the charge to the jury. It does not appear that she excepted to it when it was given.

8. — : when not to be treated as estrays.

4. New trial : instructions : exceptions. Her motion for a new trial alleged error in giving that paragraph, but did not state the ground of her objection. It cannot, therefore, be further considered.

V. Other questions are discussed by counsel, but are not of sufficient interest to be set out in detail. We have examined the record with care, but do not find any prejudicial error of which the plaintiff can complain.

AFFIRMED.

BIGELOW V. WILSON.

1. **Contract: IN TWO PARTS: CONSTRUCTION.** Two contracts which are separate in form, but in fact are only parts of the same contract, are to be construed together.
2. **——: PAROL EVIDENCE TO AFFECT WRITING: RULE STATED AND APPLIED.** Parol evidence is admissible when necessary to understand or apply the language of a written contract, but not when it is sought thereby to establish a contract at variance with the writing. (See opinion for citations.) Accordingly, where a written assignment read as follows: "I * * * do hereby sell, assign and transfer to * * * all my right, title and interest and claim to a mechanic's lien, as set forth and claimed by me in the above-entitled suit," and a collateral contract read: "It is understood that the assignment does not include [certain] subsidy notes," *held* that parol evidence might have been admitted (if necessary) to show the relation of the subsidy notes to the claim for a mechanic's lien,—as that they were held as collateral security for a part of it,—but was not admissible to show that the notes were a part of the claim assigned, and that they were excepted from the assignment,—which was absolute, and of the whole claim.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, MAY 21, 1889.

ACTION to recover from the defendant as a stockholder in the Des Moines, Osceola and Southern Railroad Company. There was a judgment for the plaintiff, and the defendant appeals.

F. F. Dawley and Wm. G. Clark, for appellant.

Cummins & Wright, for appellee.

GRANGER, J.—On the first day of April, 1885, M. H. King commenced a suit in the district court of Madison county against the Des Moines, Osceola and Southern Railroad Company to establish a claim and mechanic's lien for about fifteen thousand dollars. On the ninth day of April, 1885, King executed to R. T. Wilson & Co. an assignment in the following words, viz.: "I, M. H. King,

77	603
87	635
77	603
88	175
77	603
93	117
77	603
99	458
99	463

Bigelow v. Wilson.

plaintiff in the above-entitled cause, in consideration of the sum of ninety-three hundred dollars (\$9,300) to me in hand paid by R. T. Wilson & Co., of the city of New York, do hereby sell, assign and transfer to said R. T. Wilson & Co., all my right, title and interest and claim to a mechanic's lien, as set forth and claimed by me in the above-entitled suit, and in the petition and amended petition filed therein, and do hereby authorize the said R. T. Wilson & Co. to prosecute said suit in my name, or to have their own names substituted as plaintiffs in said cause, as they may elect. I further authorize the said R. T. Wilson & Co. to prosecute my said claim and lien to judgment for their own use and benefit exclusively, in any court they may see fit, and to cause execution to be issued therefor, and collect the same for their sole use and benefit, either in my name or in the name of the firm of R. T. Wilson & Co., as they may elect." At the same time R. T. Wilson & Co. executed to King the following: "It is understood that the assignment made by M. H. King to R. T. Wilson & Co., of mechanic's lien against the Des Moines, Osceola and Southern Railroad Company does not include subsidy notes taken by King, and now with the Des Moines National Bank, in the sum of about six thousand dollars." R. T. Wilson (defendant) was a member of the firm of R. T. Wilson & Co. In February, 1887, King obtained a judgment in the district court of Clark county, Iowa, against said railroad company, for \$6,684.69, and this judgment is based upon a part of the claim on which suit was instituted in Madison county, and which was, as appears on the face of the assignment, transferred to R. T. Wilson & Co. The judgment thus obtained was in February, 1887, assigned by King to this plaintiff. R. T. Wilson was the owner of fifteen hundred shares of stock in the Des Moines, Osceola and Southern Railroad Company, for which he was indebted to the company; and, an execution having been issued and returned unsatisfied as against the company, this suit was brought to recover of the defendant as a stockholder, under the provisions of the statute.

I. With our view of the case, the only question demanding consideration arises upon the construction of the contract of assignment, by which King transferred to R. T. Wilson & Co. the mechanic's lien involved in the Madison county proceedings. It is the contention of the appellee that the contract on its face does not fully express the understanding of the parties, and that parol evidence is necessary and permissible to aid the court in that respect. While the contract is in two parts, counsel agree that it is but a single contract, and should be so construed, and of that we think there is no doubt. The district court seemed to take appellee's view of the contract, and, against the objections of the appellant, permitted the introduction of testimony tending to show that the subsidy notes referred to in the contract were only held by him as collateral security for about six thousand dollars of the fifteen-thousand-dollar claim involved in the Madison county suit, and claimed by defendant by virtue of the assignment; and that, as to the amount so secured by the subsidy notes, there was no assignment. In other words, that only a part of the mechanic's lien claim was assigned. The language of the assignment in this respect is very decisive, and we think conclusive. It is: "I * * * do hereby sell, assign and transfer to said R. T. Wilson & Co. all my right, title and interest and claim to a mechanic's lien, as set forth and claimed by me in the above-entitled suit, and in the petition and amended petition therein." The language thus far unmistakably embraces the entire claim, including the part put in judgment in the Clark county suit. How is this affected by the other part of the contract? It reads: "It is understood that the assignment * * * does not include subsidy notes taken by King, and now in the Des Moines National bank, in the sum of about six thousand dollars." The query is, will the court allow such a contract to be so changed by parol evidence as to show that the notes were collateral to a part of the claim, and that such part was not assigned? To do so is to do violence to the language used. It is an assignment of all his interest, made in

Bigelow v. Wilson.

the most positive form. The reference to the notes in the contract shows that they bear some relation to the subject-matter of the assignment, and we think it clear that the parties intended by the second part of the contract to dissolve that relationship, whatever it might be. Conceding that they were held as security, that security was released. The notes were left to King. The first part of the contract assigns all of the mechanic's lien claim; the second part exempts from the assignment the notes in the bank. The notes are no part of the mechanic's lien or claim for which it is security. The language used is very natural language to discharge the notes from any connection in the assignment, but it is very unnatural language to overcome the plain and unequivocal statements in the first part of the contract. If the notes were held as security for the debt assigned, the assignment of the debt would carry with it the securities, and the language as to the notes was necessary to avoid such a result. If the rule contended for by the appellee is to prevail, then, merely by way of construing the contract, a radical and inconsistent change is made in its language. Instead of an assignment of all, as in terms expressed, it is made an assignment of part, and that without a word in the writing having a remote reference to such a purpose. There is not a word of technical or doubtful significance in the contract. Under familiar rules, if necessary, parol testimony would be competent to show the relation of the notes to the claim assigned,—as that they were held as security therefor,—and that would in no sense contradict or vary the contract in writing, and might enable the court to apply the subject-matter of inquiry; but the rule does not go further, and permit it to contradict the writing. The contention in this case, as in many others to which we are referred, is, is the testimony offered necessary to understand or apply the language of the written contract, or does it seek to establish one at variance with what is written? If the former, it is permissible; if the latter, it is not. The authorities cited support this rule, as well as many others. *Stapleton v. King*, 33 Iowa, 30; *Allen v. Bryson*,

Doyle v. The Chicago, St. P. & K. C. Ry. Co.

67 Iowa, 595; *Cash v. Hinkle*, 36 Iowa, 624; *Marks v. Mill and Elevator Co.*, 43 Iowa, 147; *Hutton v. Maines*, 68 Iowa, 650; *Taylor v. Trulock*, 55 Iowa, 448. The elementary authorities are in accord with this rule. We think the admission of testimony tending to show that a part of the mechanic's lien claim did not pass by the assignment was error.

II. The third instruction to the jury is in harmony with the court's view in admitting testimony, and leaves to the jury the question as to whether or not the entire claim was assigned, which, under the foregoing views, we hold to be erroneous. With this holding it seems unnecessary to notice other questions presented. The judgment of the district court is

REVERSED.

DOYLE V. THE CHICAGO, ST. PAUL AND KANSAS CITY
RAILWAY COMPANY.

1. **Railroads: INJURY TO EMPLOYEE: NEGLIGENCE: LEAVING PIN ON PLATFORM: UNFORESEEN RESULT: EVIDENCE.** Plaintiff, being with others employed in repairing one of defendant's bridges, withdrew a short distance to allow a passenger train, running at the rate of about thirty miles an hour, to pass. As it passed, an old, rusty and bent coupling pin was hurled by a wheel of a car, striking plaintiff on the head, and causing the injury complained of. The evidence (see opinion) showed that the pin was not on the bridge, and justified the jury in concluding that it was lying loose upon a platform of one of the cars. The pin had a hole in the head for a chain, and was such as was used upon cars having Miller's platform, which was on the cars in the train causing the accident; but the pin was not chained to the platform. *Held* that to allow it to lie loose upon the platform was negligence, because it was liable to fall and become an obstruction on the track, and that defendant was liable for such negligence in this case, even though the precise accident and injury which occurred could not have been foreseen and expected from the falling of the pin from the platform.
2. **The Same: EVIDENCE.** In such case a brakeman upon the train was asked if, in case a coupling-pin should roll off a platform, he would expect any extraordinary force would be given to it, so that it would do injury. *Held* that the answer sought was immaterial, and that an objection on that ground was properly sustained.

77	607
83	388
77	607
103	289

77	607
113	559

77	607
122	527

77	607
126	204
126	734

77	607
130	593

3. **The Same: EVIDENCE.** In such case the court rightly rejected evidence offered to show that the only reason for chaining the pins to the platform was that they might be at hand when wanted,—the question being solely as to defendant's duty, and not as to its motive for doing it.

Appeal from Marshall District Court.—HON. S. M. WEAVER, Judge.

FILED, MAY 21, 1889.

ACTION to recover for personal injuries sustained by plaintiff from alleged negligence of defendant's employes while operating a train on its railroad. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Hubbard & Dawley, for appellant.

T. Brown and J. L. Carney, for appellee.

BECK, J.—I. The undisputed facts of the case are these: Plaintiff, with other workmen, was employed in repairing a bridge upon defendant's road. A passenger train approaching, the workmen withdrew twelve or fifteen feet from the track. As the train passed at a speed of about thirty miles an hour, a coupling-pin of iron, about one foot long and an inch and a quarter in diameter, was hurled from the train, and struck plaintiff upon the head, and fractured his skull. The injury was severe, and from it plaintiff was ill and disabled for several months, and still suffers therefrom. It is shown by the evidence, and we think is not disputed, that the pin was thrown by the wheel of a car. A witness testifies that he heard and saw the pin "striking the wheels," and saw it thrown in the direction plaintiff, with witness, was standing. The workmen repairing the bridge, or some of them, testified that the pin could not have been thrown from the bridge, for they were working upon the part of the bridge near which the

1. RAILROADS:
injury to em-
ployee: negli-
gence: leaving
pin on plat-
form: unfore-
seen result:
evidence.

accident occurred. They were employed in repairing the track on the bridge, and doing other work repairing the bridge which required them to make close examination of it. The pin was old, rusty and bent. It had a hole in the head for a chain, such as is used upon cars having Miller's platform, which was on the cars in the train causing the accident. It is shown that it was not of the structure of the pins used by defendant, and a trainman who helped to make up the train testified that he looked for a loose pin upon the platforms of the train just before it started on the trip, and found none, and there might have been a pin on the train which he overlooked. It appears that pins of various patterns and different construction are found upon trains, being exchanged from cars of other roads. It is not shown by the direct evidence that the pin was on the train. We think the evidence authorizes the conclusion that the pin was on one of the platforms of the train. It is impossible to conclude that it was upon the bridge before the train passed. It was, then, upon the train before it was hurled away, injuring plaintiff; and the conclusion is authorized that in falling from the platform of the train it was struck or taken up by the car wheel, and thrown with force, striking plaintiff. The jury were authorized to find, from the evidence, as they did find, that the pin was upon the train prior to the accident; and, as such pins are constantly used in making up trains, and are often left upon the platforms of cars for convenience in getting them when they are wanted, the jury were authorized to infer that the pin was left upon the cars by some employe of the defendant. The petition alleges that the pin was negligently left upon the train without being fastened by a chain.

II. Counsel for defendant insists that the evidence wholly fails to sustain the allegation of negligence.

THE SAME. This position is based upon the fact that there is no direct evidence that the pin was ever on the train. But, as we have pointed out, it cannot be doubted that it was not upon the bridge. It must, therefore, have been upon the cars, and, as pins

of this character are in constant use, it is a fair inference that it was left on the cars by an employe of defendant. It was not chained, as are pins used upon cars having the kind of couplings in use upon the cars in the train causing the injury. Pins are thus fastened to prevent loss or misplacement. They are less liable to fall from the cars, and therefore prudence requires them to be chained. In falling they may cause an accident. It was therefore negligence to permit the pin to be upon the cars without being secured in its place.

III. It is insisted by counsel for defendant that if it be found that the pin was on the car there can be no conclusion that the defendant was negligent, THE SAME. for the reason that the accident was so unusual and extraordinary that it could not reasonably have been expected to happen. It may be true that the accident, in the precise form and with the precise attending circumstances which resulted in plaintiff's injury, could not have been expected to happen from the falling of the pin from the car upon the track. The reason or imagination is unable to determine just the effect of an obstruction upon the track of a railroad. The result may be unusual, unexpected, indeed a surprise to the most experienced,—never before heard of by any one,—yet the act of putting the obstruction on the track is none the less negligent, for it threatens danger in many directions, and is liable to produce many familiar results which would cause injury. Now, surely, if it causes an injury in any way that may be expected,—if the results have before been seen,—it cannot be said not to be negligent because the result was before unheard of, and not within the observation of any one, or even not anticipated in the exercise of reason or imagination. The negligence in this case produced an effect never before observed. It cannot, therefore, be said that it was the exercise of care. The rulings of the district court upon instructions are in accord with the foregoing conclusions.

IV. A brakeman upon the train was asked if, in case a coupling-pin should roll off of a platform, he

Chambliss v. Johnson.

2. ~~THE~~ same: would expect any extraordinary force would
evidence. be given it, so that it would do injury. An
objection to the question was rightly sustained. As we
have seen, the fact that the accident was unexpected
would not excuse negligence in causing it. The evi-
dence, therefore, is immaterial.

V. Defendant proposed to prove that the pins
with the Miller platforms were chained, so that they
could be at hand when wanted. The evi-
dence was rightly rejected. If the pins
would less probably be the cause of danger and injury
when chained, due care required that they be kept so
secured. It is plain that the motive with which due
care is exercised cannot be an excuse for omitting it.
So, if the pin was less likely to do injury when chained,
it should have been kept fastened, though it was not
chained, to avoid injury. The judgment of the district
court is

AFFIRMED.

CHAMBLISS V. JOHNSON *et al.*

REESE & ROBY V. THE SAME.

GAINES V. THE SAME.

HERSHEY V. THE SAME.

1. **Levees: COST: LIABILITY OF LANDS INDIRECTLY BENEFITED.**
Lands not swampy or overflowed, but which are indirectly bene-
fited by the construction of a public levee by the improvement of
means of access by roads, and by the reclamation of low, wet
lands in the vicinity, may properly be taxed to pay for the con-
struction of the levee.
2. **Levees: THROUGH TWO COUNTIES: ASSESSMENT TO PAY FOR: RIGHT
OF APPEAL.** Where a public levee is constructed through two
counties, any person aggrieved by the action of the board of super-
visors in locating the levee, or in fixing the number of acres bene-
fited by reason of the construction of it, and to be assessed to pay
for it, has the right to appeal to the district court (Chap. 85, Laws
of 1880), but on an appeal from an assessment actually made, the
question whether the land is assessable cannot be raised, but only
the question whether it has been assessed in proper proportion.
Chapter 139, Laws of 1886, does not apply to levees.

77	611
111	561
77	611
117	56
77	611
128	440
77	611
137	668

Appeals from Muscatine District Court.—HON. C. M. WATERMAN, Judge.

FILED, MAY 22, 1889.

THE plaintiffs and appellants are the owners of land upon which assessments were made to pay for the construction of a levee on the west bank of the Mississippi river from a point in Muscatine county, near the city of Muscatine, to a point near Port Louisa, in Louisa county. The plaintiffs appealed from an order assessing their lands to the district court, where trials were had, and the assessments were held to be valid. The defendants are the auditor and board of supervisors of Muscatine county. Plaintiffs appeal.

Richman & Burke and *J. Carskaddan*, for appellants.

Newman & Blake, Jayne & Hoffman, H. J. Lauder and *E. B. Tucker*, for appellees.

ROTHROCK, J.—I. In the case of *Richman v. Board, etc.*, 70 Iowa, 627, it was held that an assess-

1. LEVEES: cost: ment made to pay for the construction of
liability of
lands indi- the levee in question was void, upon
rectly bene-
fited. grounds not necessary to be repeated here.

After that assessment was made the general assembly passed a curative act, by which the construction of the levee was legalized, and provision made for an assessment of the costs thereof upon the lands adjacent thereto and benefited thereby. See chapter 17, Acts, 1886. An assessment was made under the act, and from said assessment appeals were taken to the district court, from which these appeals were taken to this court. The several causes were tried by the court without a jury. The appellants called and examined witnesses upon the question as to whether their lands were benefited by the construction of the levee. It was sought to

show that the building of the levee had not benefited their lands ; that the same were never subject to overflow from the river, but that whatever overflow of water they were subjected to was caused by back-water from Muscatine slough, and by streams from the west. Without reciting all of the evidence offered and introduced upon the part of appellants, it is sufficient to say that they claimed the right to show that the parts of their tracts of land which were assessed were in no manner benefited by the construction of the levee. The court held that this class of evidence was not competent, and that the only question which could be determined upon the appeal was whether the lands of the appellants were situated within the proper district of territory upon which a legal assessment could be made. The levee in question was of more than mere local concern. It extended from the city of Muscatine, down through that county, and into Louisa county. There is a large body of lowlands on the west side of the river. Between these lowlands and the hills and bluffs there is a slough, which extends from the south part of the city of Muscatine down into Louisa county. The lowland between the slough and the river is called "Muscatine island." All of the lands of appellants, with one exception, are on the island. On fixing the territory to be assessed, parts of the lands of appellants were included. Now, upon an appeal from the assessment, if it were competent for appellants to show that their lands ought not to be assessed because they were not within the district or territory benefited by the levee, we think that they failed to make such showing. It was not sufficient for them to prove that the parts of their land which were assessed were not directly benefited by the improvements. Lands are benefited by improvements which drain swamps and overflowed lands in the vicinity. The means of access to the lands at all times is a material consideration in determining whether a given tract should be assessed, and the health and welfare of the public in the vicinity are proper subjects of inquiry in fixing the boundaries of the territory benefited by the improvement.

Indeed, we think that if the adjacent highlands, which were not at all affected by direct overflow, were benefited by the improvement of means of access by roads, and by the reclaiming of low, wet lands in the vicinity, they might be assessed in the amount of their proper and just proportion of the cost of the improvement.

II. But in our opinion it is not competent, upon an appeal of this kind, to introduce evidence, further than to show that the land in question was not assessed in its proper proportion. It is contended that, under chapter 139 of the Acts of the Twenty-first General Assembly, it is allowable, upon an appeal, to show that the lands assessed were not benefited by the improvement. But that act applies to "ditches, drains and water-courses," and no mention is made therein of improvements by means of levees. Whether levees were omitted from the act by accident or design we have no means of determining. Aside from that act, there is no express provision of the statute authorizing such an inquiry. It is provided by chapter 85, Laws of Eighteenth General Assembly, that "any person aggrieved by the action of the board of supervisors in locating said ditch, drain or [levee], or in fixing the number of acres benefited by reason of the construction of such ditch or drain, shall have the right to appeal to the circuit [district] court of the county in which such person's land may be situated." This contemplates an appeal from the order fixing the limits of the territory proposed to be included in the district of lands to be assessed, and not from an assessment actually made. In such cases it would seem that the only question which can be determined is whether the commissioners or supervisors have fixed the proper limits to the lands to be taxed.

Special assessments for improvements upon streets, opening roads, constructing public ditches and drains, and the like, are usually attended with many difficult questions. If every owner of property is permitted by an appeal from an assessment to show that his property ought not to be assessed because it receives no benefits,

2. LEVEES:
through two
counties:
assessment to
pay for: right
of appeal.

Baker v. First Nat. Bk. of Davenport.

it would lead to almost endless litigation, and practically defeat the construction of improvements of this character. The assessment is an exercise of the power of taxation. It may be by express legislative enactment, or through such instrumentalities as commissioners or boards of supervisors; and when thus determined, like any other tax, it is not competent to question the assessment, only in so far as it may be unequal, as compared with other property in the taxing district. *Cooley, Tax'n*, 449; *Teegarden v. Racine*, 56 Wis. 545; *Dickson v. Racine*, 61 Wis. 545.

We think that, in the absence of express legislative authority for an inquiry, upon appeal, into the question as to whether the appellants' lands were within the boundaries of the territory properly assessable, it was not competent to consider that question, and that the judgment of the district court in the several cases under consideration should be

AFFIRMED.

BAKER V. THE FIRST NATIONAL BANK OF DAVENPORT
et al.

1. **Judgment: MECHANIC'S LIEN: PRIORITY: PARTIES.** In 1879, B. purchased the land in question and contracted with F. for the erection of a building thereon, which was completed about May, 1880. On the seventh of May, 1880, the defendant bank filed in that county a transcript of a judgment against B., which became a lien on the land, and at once began an action against B. and Mrs. B., plaintiff herein, to subject the land to the satisfaction of the judgment; and there was a decree that it be so subjected, and execution issued thereon, and the premises were to be sold February 24, 1883; but on that day the defendant R., who was the attorney for B. and wife in the action, took an assignment of the judgment, and the execution was returned unsatisfied. Afterwards in 1886, R. caused execution to issue on the judgment, and himself bought the property thereunder, and obtained a deed therefor. In the meantime, August 21, 1880, F. duly filed his statement for a mechanic's lien against B. for materials and work on the building, and July 29, 1881, assigned it to Mrs. B., plaintiff herein, who, in August, 1882, began an action to foreclose it, making her husband B. and the defendant bank parties; but she

Baker v. First Nat. Bk. of Davenport.

afterwards dismissed the suit as to the bank, and judgment was taken against B., and the lien established. The premises were sold, July 19, 1884, to plaintiff under this judgment, and in a year thereafter she received a sheriff's deed therefor. In an action against the bank and R. to quiet her title, *held* that, since plaintiff was a party to the bank's suit to subject the land to its judgment, but the bank was dismissed as a party to her suit to establish the mechanic's lien, its title, had it obtained one by sale under its judgment, would have been superior to hers, but, having assigned its judgment, it had no interest in the property; but that the title of R., its assignee, was superior to that of plaintiff.

2. **Attorney and Client: BREACH OF TRUST: PURCHASING JUDGMENT AGAINST CLIENT.** An attorney at law will not be allowed to profit by purchasing, against the interest of his client, the very judgment which he was employed to defeat. But where the clients were husband and wife, and the husband's land was about to be sold to satisfy the judgment against him, and the attorney, by an agreement with the husband, who represented his wife also, took an assignment of the judgment for a sum paid by him, much less than the amount of the judgment, and ordered the execution returned, with the understanding that he should hold the judgment as security for the money so advanced by him, and that it should be a first lien on the property, and that an action by the wife against the husband and the property on a claim for a mechanic's lien, which should be superior to the judgment, should be dismissed, *held* that such assignment was valid, and that, upon a refusal of his clients to repay the money, he was authorized to sue out execution on the judgment and buy in the property on which it was a lien, and that his title thus obtained was superior to the title obtained by the wife upon a foreclosure of and sale under her mechanic's lien, which was prosecuted to judgment notwithstanding the agreement,—neither the attorney nor his assignor being a party thereto.

Appeal from Jasper District Court.—HON. W. R. LEWIS, Judge.

FILED, MAY 22, 1889.

ACTION to establish the title to certain premises, and quiet the same in the plaintiff. The defendant Ryan avers title to the premises in himself, asks that it be so decreed, and that he have possession thereof. There was a decree, as prayed, for defendant Ryan, and the plaintiff and the defendant bank appeal.

Whiting S. Clark, for appellant.

Baker, Winslow & Varnum, for appellee.

Baker v. First Nat. Bk. of Davenport.

GRANGER, J.—Since long prior to February, 1876, the plaintiff and one George W. Baker have been husband and wife, and on the seventh of February, 1876, they resided in Scott county, Iowa, and on said day the defendant, the First National Bank of Davenport, obtained in said county a judgment against George W. Baker for \$3,891.38. In 1879, the plaintiff and her husband removed to Jasper county, and George W. Baker purchased the premises in question, and took the title thereto. On the seventh day of May, 1880, the defendant bank filed a transcript of the judgment obtained in Scott county in the district court of Jasper county. The plaintiff was not a party to the contract, or the proceeding in which the judgment in Scott county was obtained. In 1879, after George W. Baker purchased the premises in question, he contracted with Fowler, Lyons & Co. to furnish part of the materials, and do certain work, in building a house and other buildings on the premises. This material was furnished, and the building completed, about May, 1880. On the same day that the defendant bank filed the transcript of its judgment against George W. Baker in Jasper county, it filed a petition in equity in the circuit court of said county to subject the premises in question to the payment of such judgment. In that suit the plaintiff herein and her husband were made defendants. The defendant in this suit, Ryan, appeared in that suit as attorney for the defendants, and filed their answer, admitting the title of the premises to be in George W. Baker, but averring that the premises were bought with the proceeds of a homestead sold in Scott county, and averring a homestead right therein. After judgment an appeal was prosecuted to this court, and a judgment entered subjecting the premises to the payment of the judgment of the bank. Execution issued on the judgment, and the premises were to be sold thereon, February 24, 1883. Fowler, Lyons & Co., by virtue of their contract for material and labor, were the creditors of George W. Baker in the sum of \$829.45, and duly filed their statement for

1. JUDGMENT:
mechanic's
lien: priority:
parties.

Baker v. First Nat. Bk. of Davenport.

a mechanic's lien, August 21, 1880. July 29, 1881, Fowler, Lyons & Co. for a consideration assigned their claim and lien against George W. Baker to the plaintiff. In August, 1882, the plaintiff herein commenced a suit in the circuit court of Jasper county against George W. Baker and the defendant bank in this suit to recover judgment against George W. Baker, and to establish the mechanic's lien. The suit was afterward dismissed as to the bank, and judgment was taken against George W. Baker, and the lien established. The premises were afterwards sold on special execution issued on said judgment, and purchased by the plaintiff on the nineteenth day of July, 1884, and on the twenty-second of July, 1885, she received a sheriff's deed therefor. This deed and the alleged homestead character of the premises constitute the basis of the plaintiff's claim in this proceeding.

On the twenty-fourth day of February, 1883, that being the day on which the premises were to be sold on the execution issued on the judgment of the defendant bank herein against the plaintiff herein and George W. Baker, the defendant Ryan, then being the attorney for the plaintiff and her husband, took from the plaintiff in that suit (the defendant bank in this suit) an assignment of its judgment and claim against George W. Baker, and paid therefor the sum of sixteen hundred dollars, and the execution was returned not satisfied. The particular facts of this assignment to Ryan of the judgment rest largely on the testimony, and will be noticed hereafter.

On the fourteenth day of January, 1886, the defendant Ryan took execution on the judgment assigned to him, and, by virtue thereof, he purchased the premises in question, and, after the statutory period for redemption, he received a sheriff's deed therefor, which is the basis of his claim in this suit.

While many other facts are disclosed by the record, the foregoing are sufficient to a proper understanding and disposition of the case. We think it must be conceded that if the First National Bank of Davenport

Baker v. First Nat. Bk. of Davenport.

had not assigned its judgment, and had sold and purchased the premises on February 24, 1883, and had afterwards taken a sheriff's deed therefor, the claim of the plaintiff in this suit could not prevail against it, for the reasons that the plaintiff in this suit and her husband were both parties in the suit of the bank to subject the premises to the payment of its judgment, and the bank was not a party to the suit of Hannah Baker against her husband for the enforcement of her mechanic's lien. It is true the bank was originally a party, but the suit was dismissed as to it before judgment. As between the bank and Hannah Baker the premises were, as the result of a final adjudication, liable for the payment of the judgment.

What, then, are the facts to distinguish the case as to the defendant Ryan, who was the assignee of the judgment? He was, at the time of purchasing

2. ATTORNEY
and client:
breach of
trust: pur-
chasing
judgment
against cli-
ent.

ing the judgment, the attorney for both Hannah Baker and her husband, and had been during the prosecution of the suit to subject the premises to the payment of the judgment held by the bank; and the contention of the plaintiff is that, being her attorney, he could not purchase the very judgment he was employed to defeat. That an attorney could not, as against the interest of his client, make such a purchase, is so elementary and clearly established by authority that neither citation nor argument is necessary to sustain it. It would be an unwarrantable strain upon our jurisprudence for the courts to tolerate such an act, even under circumstances of strong suspicion.

For the facts as to this purchase we must look to the testimony. The purchase of the judgment took place on the day the premises were to be sold on the bank judgment against George W. Baker. There were present at the time Ryan, George W. Baker, and some parts of the time one George E. Gould, who was attorney for the bank, and who made the assignment for the bank, and one Shropshire. Neither Gould nor Shropshire was a witness to the entire talk between Baker and

Ryan. At this time George W. Baker had full control and management of his wife's interests, and they had no expectation of saving the property from the bank judgment, unless Ryan did something to save it; and it is unquestioned that there was talk between them as to what should be done. It is claimed that Ryan was in fault for the manner of the submission of the case of the bank against Baker and wife to subject the premises to the payment of the judgment, and as a consequence the suit was lost to Baker and wife, and on that account Ryan felt himself under obligation to purchase the judgment for their protection, and that he did so; while Ryan's contention is that he bought the judgment at the request of Baker, and with the understanding that he should hold it as security for the repayment of the money to him. The testimony of Ryan and Baker, each in general terms, supports his theory of the case. The testimony of Gould is that he heard nothing of what the agreement was between Baker and Ryan. He testifies that, on meeting Baker at the office of Ryan, Baker claimed that the bank was asking too much for the judgment, and that he refused to further consider a proposition to reduce the amount, and said that unless it was paid the sale would take place. Baker says in his testimony that Ryan then asked Gould if he would take one payment down, and divide the other in two payments, and take his notes; and that Gould agreed to do so, and Gould was to make an assignment of the judgment. Baker says. "I did not understand it was to be assigned to Ryan. I did not know who it was going to be made to, but it went through my head as a wonder whom it was going to be made to. I asked no questions. I supposed he settled it on a proposition I made before I went to Davenport, to save me as his client and himself as an attorney." Baker further says: "The property I offered Ryan on my wife's behalf, if he would buy the bank judgment, is a house and lot in Newton."

The testimony of Baker is very uncertain. From his testimony alone it would be difficult to know what the

Baker v. First Nat Bk. of Davenport.

agreement was. It is quite certain from his own statements that in some manner Ryan was to be secured or paid for the purchase of the judgment. The judgment was for \$3,891.38, with interest at ten per cent. since February, 1876. It was bought for sixteen hundred dollars, which is the amount Ryan claimed, with interest. The witness Shropshire, who was present a part of the time on the day of the assignment, testifies, in substance, that himself, Baker and Ryan were there.

Ryan asked Baker what he should do about it. Baker answered that he could not do anything about it himself, and that Ryan would have to do it for him; that Ryan said, "Keep your seat;" that Ryan was gone a few minutes, and came back, and said to Baker: "It is all fixed," and told Baker he would have time to make arrangements to pay his debts; that Baker seemed very much "touched," shed tears and said: "A friend in need is a friend indeed." At that time the mechanic's lien suit by the plaintiff against her husband was pending, and Ryan claims that it was part of the agreement that that suit was to be dismissed, and the judgment assigned to him was to be the first lien on the premises; and he says in his testimony that after the assignment he wrote out a "dismissal" of the mechanic's lien suit, in the presence of Baker, which he approved. Shropshire says that something was written by Ryan, but he does not know what it was.

From an examination of the testimony we are convinced that Ryan took the assignment of the judgment under an agreement as claimed by him. It does not appear to be a purchase of the judgment made in his own interest, but at the request of his clients, to give them an opportunity to pay the debt, and save the homestead. If this is true, it could not be claimed that the transaction was void because of the confidential relationship of the parties. If Ryan, while attorney for the Bakers, at their instance bought the judgment, and was to be repaid his money, and the judgment was, by agreement, to be the first lien on the premises, and the mechanic's lien suit was to be dismissed, it would

Baird v. Boehner.

be an act of gross injustice to allow the plaintiff, in violation of the agreement, to prosecute the suit to judgment, and thereon obtain a title as a basis of avoiding the agreement with Ryan. Neither the homestead character of the premises nor the title based on the mechanic's lien judgment can avail to defeat the title of defendant Ryan. The record conclusively shows that before taking execution on his judgment he was willing to comply with his agreement, and cancel the judgment on the repayment of his money, and to give all reasonable time for that purpose, which was refused. This finding of fact and law is conclusive of all the questions presented in the record. We do not understand from the record that appellant the First National Bank of Davenport is making any claim adverse to the defendant Ryan, and the judgment of the district court is

AFFIRMED.

BAIRD V. BOEHNER.

1. **Contract: LEGAL AND ILLEGAL AGREEMENTS: DIVISIBILITY: AGREEMENT NOT TO PROSECUTE.** Plaintiff, an unmarried woman, being pregnant by defendant, agreed in writing with him as follows: (1) To leave and stay away from their place of residence one year; (2) to waive civil claims against defendant; (3) to waive criminal claims against him; and, in consideration thereof, defendant agreed to pay her a certain sum monthly, and to convey to her certain real estate. In a subsequent civil action for the seduction, this contract was pleaded as a defense. *Held—*

- (1) That the first element in plaintiff's agreement may have been lawful, but not if the purpose of her absence was to defeat a criminal prosecution.
- (2) That the second element—the waiver of civil claims—was lawful.
- (3) That the third element—the waiver of criminal claims—was an agreement not to prosecute defendant criminally, and was clearly unlawful.
- (4) That the three elements of her agreement were so connected, as constituting together the consideration for defendant's promise, that they could not be separated, and that therefore the contract was void *in toto*, and constituted no defense to the action for seduction.

77	622
100	574

77	622
109	206

77	622
139	499

77	622
143	439

Baird v. Boelner.

2. **Seduction: VOLUNTARY SUBMISSION: INSTRUCTION.** In an action for seduction, an instruction that if plaintiff voluntarily yielded to defendant's desires, she cannot recover, is not prejudicial to defendant, but rather favorable.
3. ——— : **EXCESSIVE VERDICT: APPEAL.** The trial court refused to set aside a verdict for sixty-seven hundred and fifty dollars for the seduction of an unmarried woman. *Held* that this court could not interfere, in the absence of any indications of passion or prejudice on the part of the jury.
4. ——— : **EVIDENCE OF FORMER INTIMACIES.** In an action for seduction, plaintiff was allowed to show that after she had submitted to defendant's desires she determined to reform, and to that end absented herself for some months, and that after her return defendant resumed his intimacy and she again yielded. *Held* that evidence of their relations before she went away was admissible as showing the extent of his control over her, and the manner in which he acquired it.
5. ——— : **EVIDENCE: TIME OF PREGNANCY.** In such case it was certainly competent for plaintiff to show that she became pregnant, and, if so, to show when it occurred.

Appeal from Mills District Court.—HON. A. B. THORNELL, Judge.

FILED, MAY 22, 1889.

ACTION by an unmarried woman to recover for her own seduction, which was accomplished by declarations of love, and by promises of marriage, and acts which implied a promise of marriage. There was a judgment upon a verdict for plaintiff. Defendant appeals. The case has before been in this court. See 72 Iowa, 318.

Watkins & Williams, for appellant.

John Y. Stone, for appellee.

BECK, J.—I. The objections to the judgment will be considered in the order of their discussion by defendant's counsel. The evidence upon the last trial differed from the evidence on the first, as to the means used by defendant to accomplish plaintiff's seduction. It was shown at the last trial that she was induced to submit

Baird v. Boehner.

to defendant's desires by promises of marriage and professions of love made by him. The point upon which the case was decided upon the former appeal is not now in it.

II. A count of the answer pleads as a defense that the cause of action was fully settled by a written agreement which the parties executed, in the following language: "It is agreed by the parties signing this contract as follows: The party first signing agrees to leave Malvern immediately, and further agrees to waive all claims, both criminal and civil, against party signing this contract second. And first party further agrees to stay away from Malvern one year from date of signing. The party signing this contract second agrees to pay to party of the first part forty dollars per month, commencing May 15, 1884, and to continue until the party signing this contract second shall dispose of the offspring, which is liable to occur, providing said birth shall happen within five months after signing this contract, and it is understood that party signing the contract second shall have eight months after the birth to dispose of the child; and second party agrees to deed to first party a certain double house situated on Third avenue, in Malvern, in the south part of town, which is the property of second party.

"Malvern, April 24, 1884.

"MAY L. BAIRD,

"L. W. BOEHNER."

As applicable to this defense, the defendant asked the court to give to the jury the following instructions, which were refused: "(3) If in the alleged contract for a lawful consideration plaintiff undertook to do several things, some of which were lawful and some of which were illegal, and if the lawful things can be separated from the illegal ones,—that is, if she could perform the lawful ones without thereby doing any part of the illegal ones,—then the contract is valid, unless it was obtained by fraud. (4) Unless you find that the consideration which the defendant was to give plaintiff by

the terms of said contract was unlawful, and that the acts which plaintiff was to perform under said contract were capable of being separated, and some were lawful and some were not, then, as to such acts as she could lawfully perform, the contract is valid." "(11) As the evidence shows without any conflict that the only subject discussed between the defendant and Henry Baird, at the time the contract admitted to have been executed between these parties was executed, was the subject of the act at Plattsmouth, which evidence was produced by plaintiff, you cannot find that the purpose of the parties was to compound an offense, and the contract is an absolute defense to this action, and you must find for the defendant. (12) The admitted contract is not upon its face illegal, and, as the evidence shows without any conflict that the only subject discussed at the time it was executed was the act at Plattsmouth, which was not a crime, and as its terms cover the claims set up in this action, you must find for the defendant."

These instructions were refused, and the following were given: "(21) If the evidence fails to show that the agreement in question was obtained from plaintiff through fraud, you should then consider whether said contract is illegal. A contract that injuriously affects or subverts the public interests, or if by its terms, or contemplated manner of performance, it is intended to prevent or impede the due course of public justice, it is to be deemed invalid. It is the duty of every citizen to refrain from voluntarily placing himself in a position in which it is to his pecuniary interest to suppress, stifle or impede a public prosecution of crime. Hence all agreements not to institute criminal proceedings, and all agreements in any way to prevent or stifle such prosecutions, are immoral and illegal. (22) If, after considering all of the facts and circumstances shown by the evidence to have been contemplated by the parties at the time of making the agreement in question, you believe that the real purpose of the parties in making said contract was to provide thereby that plaintiff should not prosecute defendant criminally for the alleged

Baird v. Boehner.

act of seduction, and to provide means for secreting plaintiff, so that she could not be found and used as a witness against defendant by the state in a criminal prosecution for said act, then the contract is void, and constitutes no defense to this action. (23) But if you believe from the evidence that the 'criminal claims' referred to in the agreement had reference to bastardy proceedings for the support of the child, referred to in the agreement, and that it was not the purpose of said agreement to prevent plaintiff from prosecuting defendant criminally for the alleged act of seduction, or to hire her not to so prosecute defendant, nor to place her beyond the reach of the state, so that she could not be used as a witness against defendant in a criminal prosecution, then said contract would not be illegal, and it would be a complete bar to plaintiff's recovery in the case, unless you find from the evidence that said contract was obtained through fraud, as before explained." These rulings upon instructions counsel insist are erroneous. We will proceed to consider them.

The contract, it will be observed, obligates plaintiff to do three things, namely: (1) To leave and stay away from Malvern one year; (2) to waive civil claims against defendant; (3) to waive all claims criminal against defendant.

The first thing to be done by plaintiff may have been lawful, if there was no purpose thereby to defeat or evade the law. We may assume that it is lawful, though, indeed, it appears that the purpose of securing plaintiff's absence was to defeat a criminal prosecution. The second thing—the waiving of civil claims—may lawfully be done. The third—the waiving of "criminal claims," which evidently means an agreement not to prosecute defendant criminally—is evidently in conflict with the law. No agreement not to prosecute another for a crime will be recognized and enforced by the law. This rule is founded upon the strongest demands of public policy. The criminal laws of the state would rarely be enforced were it left to the defendant and those authorized to institute prosecutions for crimes to arrange by

Baird v. Boehner.

contract, based upon consideration, so that the offender would not be prosecuted in the courts. *Haines v. Lewis*, 54 Iowa, 301.

III. But it is contended by defendant that, as the contract provides for doing acts which are legal as well as the illegal act, it may be enforced as to
THE SAME. the legal acts. Counsel regard the contract as to the obligations of plaintiff as divisible, and insist that it may be enforced as to the obligation which is legal. This is correct, with this exception: If the acts, legal and illegal, are so connected that they cannot be separated, the whole promise is void. *Casady v. Woodbury County*, 13 Iowa, 113. Now, plaintiff's obligation—her promises to do and not to do the prescribed acts—are connected as constituting together the consideration of defendant's promise to pay money and conveyed land. Her promise to do the illegal acts is so bound with her agreement to do the legal act, by the fact that they both constitute a consideration, that they cannot be separated. If plaintiff should attempt to enforce the contract after she had violated it by prosecuting defendant, she could not insist that the contract is divisible, and that she should recover to the extent to which her other promises constituted a part of the consideration. It will not be claimed that she could recover. It could not be determined just what sum defendant ought to recover against plaintiff's claim to recover for his breach of the contract. Indeed, it would appear that the agreement protecting defendant from criminal prosecution constituted the main weight of the consideration upon which he agreed to pay plaintiff money and convey to her land. These views lead us to the conclusion that the rulings of the court below upon the instructions above set out are correct.

IV. The eleventh and twelfth instructions asked and refused we think do not correctly state the facts upon which they are based. It does not follow that the only act discussed when the contract was executed, if lawful, would make valid the contract obligating the parties to

Baird v. Boehner.

do an unlawful thing. Nor does the evidence show that the "act at Plattsmouth" was not a crime.

V. Certain instructions, given, hold that, if plaintiff voluntarily yielded to defendant's desires, she cannot recover. Counsel for defendant complain of this rule. We think it is favorable to defendant, and, if erroneous at all, the error is to his advantage. If plaintiff's will had been overcome by defendant's importunity, flattery, professions of love and the like, so that she voluntarily submitted, it would hardly be claimed that she could not recover. Counsel think the rule should have been stated in this language: "If he accomplished his purpose by any importunity, without deception, plaintiff cannot recover." But this statement implies the thought that her will was overcome by importunities. It scarcely differs from the thought of the instruction.

VI. It is strenuously urged that the court below erred in refusing to set aside the verdict, which was for sixty-seven hundred and fifty dollars, on the ground that it is excessive. It is not to be denied that it is large, but we are unable to say that it is beyond the limit demanded by justice, and indicates, by its excess, passion and prejudice on the part of the jury. It was the province of the jury to assess the damage. We are unable to say that any smaller sum would be nearer the actual compensation which should be awarded to plaintiff.

VII. After plaintiff had often submitted to defendant's desires, she determined, as she testifies, to break off her relations with him, and reform. To accomplish this end, she went to Kansas, and remained for eight months. After her return defendant resumed his intimacy with her, and she again submitted to his desires. Defendant objected to evidence showing the relations of the parties and other matters connected with them before she went to Kansas. We think it was rightly admitted. It disclosed the relations between the parties, the extent of

2. SEDUCTION:
voluntary
submission:
instruction.

3. —:
excessive
verdict,
appeal.

4. —:
evidence
of former
intimacies.

Drain v. Jacks.

the control which defendant had acquired over plaintiff, and the manner in which he acquired it,—matters proper to be considered in determining plaintiff's right to recover.

VIII. Plaintiff was permitted to give evidence as to the time when she became pregnant. It is insisted that it was not competent. We think that it tends to disclose the relations of the parties and the results of the alleged seduction. It was surely competent to show that plaintiff did become pregnant. If so, it is proper to show when it occurred. The foregoing discussion disposes of the questions of the case, so far as they are discussed by counsel. The judgment of the district court is

AFFIRMED.

77 629
1132 272

DRAIN V. JACKS.

Forcible Detention of Real Estate: NOTICE NECESSARY TO ACTION.

An action of forcible entry and detainer may be maintained against a tenant holding over after the termination of his lease, though the notice to quit, required by section 8614 of the Code, is given before the lease has expired. (Compare *McLain v. Calkins*, ante, p. 468.)

Appeal from Fremont District Court.—HON. A. B. THORNELL, Judge.

FILED, MAY 22, 1889.

S. Holmes, for appellant.

Hammond & Campbell and *Wm. Eaton*, for appellee.

GIVEN, C. J.—This is an action for forcible detention of a certain eighty acres of land. It is admitted that the defendant had the right to possession up to March 1, 1888. February 24, 1888, he was served with notice to quit "on or before the first day of March, 1888." The defendant having failed to quit on or before March

Gray v. Wolf.

first, this action was brought before a justice of the peace, March 6, 1888, and appealed to the district court. On the trial in the district court, the court directed the jury to return a verdict for the defendant, "for the reason that it was not shown by the evidence that any notice to quit the premises in question was served upon the defendant after the termination of the tenancy, on the first day of March, 1888, and three days before the commencement of suit, on March 6, 1888," to which the plaintiff excepted. This precise question was ruled upon at the present term in *McLain v. Calkins*, ante, p. 468, wherein we held that the notice to quit required by section 3614, Code, may be given before the expiration of the term. The action of the district court must be

REVERSED

GRAY *et al.* v. WOLF.

1. **Original Notice: SUFFICIENCY: AMOUNT CLAIMED.** The original notice in this case, following the language of the note sued on, notified defendant that plaintiffs' petition would be on file claiming of him "one hundred and seventy-nine and thirty one-hundredths, with ten per cent. interest" from the date of the note, — the word "dollars" being evidently intended, but omitted. *Held* that it was not a case of no notice, but of irregular notice only, and that a judgment for so many dollars was not void. (Compare *Woodbury v. Maguire*, 42 Iowa, 339, and *Bunce v. Bunce*, 59 Iowa, 533.)
2. ———: ———: **SIGNATURE OF OFFICER.** The return of the original in this case showed personal service and was signed thus: "By J. R. MYERS, Deputy. J. W. WORKMAN, Sheriff." *Held* to be good, as showing service by Myers, as deputy of Workman, sheriff.
8. **Appeal: ERRORS WHICH SHOULD BE CORRECTED BELOW.** Mere defects in an original notice properly served should be corrected by motion of the defendant in the court below, and do not warrant the defendant in making default and then appealing to this court. (See Code, sec. 8168.)

Appeal from Wapello District Court.—HON. CHARLES D. LEGGETT, Judge.

FILED, MAY 22, 1889.

77	630
89	482

THE facts appear in the opinion.

E. L. Burton and W. H. C. Jaques, for appellant.

Chambers, McElroy & Roberts and W. S. Coen, for appellees.

GIVEN, C. J.—On November 30, 1887, the plaintiffs filed their petition, setting forth as their cause of action that about September 4, 1871, defendant executed to them his promissory note as follows: "OTTUMWA, IOWA, Sept. 4, 1881. One day after date, for value received, I promise to pay Gray, Baker & Madison one hundred and seventy-nine and thirty one-hundredths, with ten per cent. interest per annum. JOSEPH WOLF." An original notice was issued and personally served on the defendant, notifying him that the petition of the plaintiffs would be filed, "claiming of you one hundred and seventy-nine and thirty one-hundredths, with ten per cent. interest per annum from Sept. 4, 1871." The return showing personal service is signed: "By J. R. MYERS, Deputy, J. W. WORKMAN, Sheriff." The defendant failing to appear, default and judgment were entered against him "upon the note sued upon in the sum of \$472.68." Without further proceedings in the district court, the defendant on the fourteenth day of July, 1888, served a notice of appeal on the plaintiffs' attorney and the clerk of the district court, and secured the clerk's fees for transcript. It is claimed on behalf of appellant that there was no sufficient original notice, in that it did not state that the plaintiff claimed any sum in money of defendant or any cause of action, and that the return showed no legal service. Appellee moves to dismiss the appeal on the ground that appellant made no motion in the court below to correct the irregularities he assigns as errors, as required by section 3168 of the Code. Said section provides that "a judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court until such motion has been made."

Brannum v. O'Connor.

there and overruled." The notice, following the language of the note sued upon, omits the word "dollars;" but from the words used there was no room for question but that the plaintiff sued to recover \$179.30 in money. The notice does not state the cause or grounds of this claim for \$179.30. In *Dougherty v. McManus*, 36 Iowa, 657, where the same defect existed in the notice, and judgment had been rendered thereon, this court says: "It by no means follows that his judgment is void, and, as such, may be collaterally assailed. It is not a case of no notice. The most that can be said is that it is a case of defective notice." See, also, *Woodbury v. Maguire*, 42 Iowa, 339; *Bunce v. Bunce*, 59 Iowa, 533. Personal service of the original notice was made "by J. R. MYERS, Deputy. J. W. WORKMAN, Sheriff." This was a service by Myers as deputy of Workman, sheriff. The original notice being at most but a defective notice, and having been properly served, the defendant should have appeared in the court below to correct the errors now complained of. *Pratt v. Stage Co.*, 27 Iowa, 363. The case is clearly within the provisions of section 3168, Code, and the judgment of the district court will be

AFFIRMED.

BRANNUM V. O'CONNOR.

77	632
87	559

1. **Instructions: EVIDENCE TO WARRANT.** Action on a note alleged to have been given to plaintiff to induce him to live with his wife, notwithstanding the fact that she was, without his knowledge, pregnant by another man at the time of marriage. The court instructed the jury as to their duty in case they found that the note was given by defendant "by reason of the woman having been brought up in his family." It was objected that there was no evidence warranting the instruction; but *held* that, while there was no direct evidence that the note was given for that reason, there was evidence (see opinion) from which the jury might reasonably infer that such reason was not without weight in inducing defendant to make the note, and that therefore the instruction was not erroneous on the ground urged.
2. **Promissory Note: CONSIDERATION.** A man, who innocently marries a woman found to be pregnant at the time of marriage by another man, is not bound to live with her (Code, sec. 2224), nor to support the child; and an agreement to do these things is a good and valid consideration for a note given him on account thereof.

8. **Practice: ARGUMENT TO JURY: READING MOTION FOR CONTINUANCE.** An affidavit for a continuance, when duly filed, is a part of the record in the case in which it is so filed, and it may be read to the jury and commented upon by counsel in argument (*Hanners v. McClelland*, 74 Iowa, 323; *Cross v. Garrett*, 35 Iowa, 486); and it may be so read and commented upon, although filed in another but cognate case in the same court, when the understanding is that it shall be treated as applying to both cases, and it is so treated

Appeal from Mills District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, MAY 22, 1889.

PLAINTIFF seeks to recover the amount of a promissory note. Defendant alleges that it was made under duress, without consideration, and for an illegal consideration, and also pleads counter-claims. There was a verdict and judgment for plaintiff. The defendant appeals.

A. R. Anderson and Stone & Gilliland, for appellant.

Jas. McCabe and S. McPherson, for appellee

ROBINSON, J.—Plaintiff was married to a foster-daughter of defendant on the tenth day of October, 1886, and on the twenty-seventh day of March, 1887, she gave birth to a child. Plaintiff claims, and the evidence on his part tends to show, that defendant was the father of the child. Plaintiff first discovered that his wife was pregnant on the twenty-second day of December, 1886, and the note in suit was given to him by defendant on the thirty-first day of the same month. It is for fifteen hundred dollars, payable eight days after its date, with interest at ten per cent. after maturity. Another note for five hundred dollars was also given by defendant to plaintiff on the same day. Plaintiff claims that they were given in consideration of his promise to continue to

Brannum v. O'Connor.

live with his wife, and to maintain the child. Defendant claims that they were given because of threats made by plaintiff to prosecute him criminally, and to take his life, and in consequence of an undue influence exercised over him by plaintiff. The counter-claims of defendant are based upon alleged slanders uttered by plaintiff, and upon an alleged assault and battery. The jury allowed defendant \$617.50 on his counter-claims and returned a verdict for the amount due on the note after deducting the sum allowed defendant.

I. The court charged the jury as follows: "If you believe the facts to be that plaintiff's wife was pregnant by some person other than plaintiff at the time when he married her, and that he was ignorant of this fact at the time of the marriage, and that the defendant, either by reason of the woman having been brought up in his family, or by reason of his being the father of her child, was desirous that plaintiff should condone the said offense, and retain the woman as his wife, and maintain and provide for the child as his own, and the note in suit was made by defendant in pursuance of an agreement between plaintiff and defendant to the effect that plaintiff should retain the woman as his wife notwithstanding such pregnancy, and should maintain and provide for her child as his own, and that defendant should give to plaintiff the note in suit, this state of facts would show a good and legal consideration on plaintiff's part for the execution of the said note." It is contended by appellant that there is no evidence that he signed the note in suit "by reason of the woman having been brought up in his family," and therefore that the portion of the charge quoted is erroneous. No one testified in terms that the note was signed for the reason stated, but direct testimony to that effect was not necessary, if there was evidence which tended to show that it was in fact signed for a reason substantially as charged. A priest who had been consulted by plaintiff during the negotiations wrote a letter to defendant, which he offered in evidence, urging him to settle with plaintiff, and giving as one of

1. INSTRUCTIONS:
evidence to
warrant.

several reasons for his doing so that, as the woman had been adopted by him, the matter was on that account more terrible and scandalous, and for the sake of his relationship, and for other reasons, it should be settled, and not made public. There was evidence which tended in some degree to show that the reasons given by the priest as aforesaid were not without weight in bringing about a settlement between the parties. The facts of the case were such that the charge was not inapplicable, and we think there was no error on the ground that the evidence did not warrant it.

II. It is insisted by appellant that the note is not supported by a sufficient and valid consideration, and that the law in that regard was not correctly stated in the paragraph quoted. We are of the opinion, however, that the charge is not vulnerable to the objection made. The plaintiff was under no legal obligation to live with his wife under the facts disclosed by the evidence. Code, sec. 2224. He could not be compelled to maintain her child by another man. Therefore his agreement to do these things was a sufficient consideration for the note. It is said that the act and condition of the wife were condoned by the husband before the note was given, and therefore that it was without consideration; but appellant has not called our attention to any evidence which shows a condonation, and we are of the opinion that it has not been established. Moreover, the question of condonation does not seem to have been raised in the court below.

III. Appellant complains of the action of the district court in permitting counsel for plaintiff to read to the jury an affidavit for a continuance made by defendant, and to comment thereon. It has been held that such an affidavit, when duly filed, is a part of the record of the case in which it was so filed, and that it may be read to the jury, and commented upon by counsel in argument. *Hanners v. McClelland*, 74 Iowa, 323. *Cross v. Garrett*, 35 Iowa, 486. It is claimed by appellant that the affidavit in question was not filed in this case, and therefore

2. PROMISSORY
note: consid-
eration.

3. PRACTICE:
argument to
jury: reading
motion for
continuance.

The Green Bay Lumber Co. v. Ireland.

that it was not proper to read and comment upon it. The fact appears to be that the affidavit was filed at a previous term of court in a case entitled *Mary Brannum v. Thomas O'Connor*, with the understanding that it should be treated as applying to this case, which was then pending in the same court, and that it was so treated. Appellant, in his motion for a new trial, states that it was filed in this cause. Under these circumstances we think the affidavit was properly treated as a part of the record of this case for the purpose stated. The judgment of the district court appears to be correct, and is therefore

AFFIRMED.

77	636
79	726

THE GREEN BAY LUMBER COMPANY V. IRELAND *et ux.*

Occupying Claimant: RELIEF IN EQUITY. Defendant built a house on lots owned by another, with the understanding that a contract of sale to defendant might be completed, which was never done, and the owner of the lots sold them to H. for the value of the lots without the house, and H. sold to plaintiff for a still smaller sum, —defendant all the time being in possession, and H. and plaintiff both purchasing with full knowledge of the facts. In this action to quiet title in plaintiff, *held*—

- (1) That the title of the lots should be quieted in it, but that defendant should have leave to move the house within thirty days.
- (2) That equity had power to grant full relief, and that the law for the benefit of occupying claimants did not furnish the only remedy for defendant.

Appeal from Ida District Court.—HON. J. H. MACOMBER, Judge.

FILED, MAY 23, 1889.

ACTION to quiet the title of certain lots in Ida Grove. There was a judgment for the plaintiff, and defendants appeal.

J. C. Walter and L. A. Berry, for appellants.

Warren & Buchanan and C. W. Rollins, for appellee.

GRANGER, J.—The defendant Silas Ireland built on the premises in question a house and made other improvements, under claim of purchase thereof by oral contract with the Blair Town Lot and Land Company. Afterwards the Town Lot and Land Company sold the lots by contract to one Hoyt, who assigned the contract to the plaintiff company. The principal point in controversy is as to the title or right of the defendant Silas Ireland to occupy the premises. The contract under which Ireland took possession of the lots is involved in much doubt as to time of payments and some other particulars, and we think it unnecessary to make definite findings in that respect. It is, indeed, doubtful if there was any definite understanding. From the testimony we feel satisfied that Ireland built there expecting to pay for and own the lots, and, after he was in possession, the Town Lot and Land Company, by its agent, knew of this possession, and hoped for a completion of the contract of sale by payment of a part of the purchase price. After Ireland was in possession and making the improvements, there was talk of making the payment. It was not the understanding that it was to be a sale without a cash payment, and no such payment was made. We think there never was a sale. In fact it is scarcely urged in argument that there was a completed contract between the Town Lot and Land Company and the defendants; appellants' contention being apparently with regard to the house as distinct from land. Without reviewing the testimony, we will state our conclusions, that as to the lots the appellee is the owner, and the title thereto is quieted in it. The house was built on the land with an understanding that a contract of sale might be completed, and the Town Lot and Land Company, in selling the lot in question, sold it for the value of the lot alone,

Snyder v. Foster.

regardless of the house, from which we infer that the Town Lot and Land Company never designed to claim or sell the house. Hoyt, as well as the plaintiff, bought with full knowledge of the facts, and with the defendant residing on the premises. Hoyt gave seventy-five dollars for the lot and the plaintiff fifty dollars. The plainest principles of equity forbid such a sacrifice on the part of the defendant. He should be permitted to remove the house from the lot within a reasonable time, thereby giving to each party his rightful possessions. The claim that the defendants' only remedy for the house is by proceeding under the law for the benefit of occupying claimants is not correct. Equity has power to give full relief. The judgment below is so far modified as to allow the defendant to remove the house from the premises within thirty days; the costs of the appeal to be paid by the appellee.

MODIFIED AND AFFIRMED.

SNYDER V. FOSTER *et al.*

1. **Counties: UNLAWFUL EXPENDITURE OF MONEY: RIGHT OF ACTION TO ENJOIN.** A tax-payer may maintain an action in his own name to prevent unlawful acts by public officers, which would increase the amount of taxes he is required to pay, or diminish a fund to which he has contributed. (See opinion for citations.) Accordingly, *held* that an action may be maintained by a tax-payer to prevent the county officers from paying out money on a contract for the erection of a bridge which the county had no legal authority to erect.
2. ——— : **POWERS OF SUPERVISORS: BRIDGES OVER NAVIGABLE LAKES.** Boards of supervisors have no power to construct bridges over navigable lakes, no such power having been conferred by statute upon them; consequently county funds cannot be appropriated to the payment of claims arising from the construction of such a bridge under contract with the county; and the fact that the bridge is furnished with a draw to admit the passage of boats makes no difference. (See opinion for discussion of the point on principle and authority by ROBINSON, J.)

77	638
81	581
77	638
88	586
88	694
77	638
92	124
77	638
106	677
77	638
129	248
77	638
6133	713

Snyder v. Foster.

Appeal from Dickinson District Court.—HON. GEORGE
H. CARR, Judge.

FILED, MAY 23, 1889.

ACTION in equity to enjoin defendants from auditing, allowing or paying claims for the building of a bridge across a navigable lake. A demurrer to the petition was overruled, and, defendants refusing to further plead, a decree was rendered in favor of plaintiff as prayed. The defendants appeal.

Soper & Allen, for appellants.

Parker & Richardson, for appellee.

ROBINSON, J.—Plaintiff is a resident and tax-payer of Dickinson county, and defendants are the said county, its auditor, treasurer, the members of its board of supervisors, and the person who contracted to build the bridge in controversy. The contractor did not appear in the district court, and the cause was there continued, as to him, for service. He is not therefore a party to this appeal. On the nineteenth day of June, 1888, the board of supervisors of Dickinson county ordered the construction of a public bridge across a navigable body of water known as "East Okoboji lake," and on the first day of the next August entered into a contract for the building of the bridge for the price of forty-nine hundred dollars. The contract required the bridge to be eleven hundred feet long and sixteen feet wide; to be constructed with a draw, which could be opened for the passage of boats, and which would furnish the only means for the passage of boats through the bridge. A highway has been established on each side of the lake to points which the bridge is designed to connect, but no highway has been located where it is proposed to build the bridge, and no proceedings have been instituted for that purpose. No special act of congress or of the general assembly of the state of Iowa, giving authority to the

Snyder v. Foster.

board of supervisors of Dickinson county to construct a bridge over the lake named has ever been passed. It is shown that, unless restrained by order of court, the funds of said county will be appropriated and used by defendants in paying for the bridge in question.

I. It is claimed by appellants that plaintiff is not entitled to maintain this action, for the reason that he

1. **COUNTRIES :** has no interest to subserve excepting that
 unlawful shared in common by other tax-payers, and
 expenditure because the state of Iowa alone has the right
 of money : to object to the building of the bridge over
 right of action its navigable waters. The case of *Bell v. Foutch*, 21
 to enjoin. Iowa, 132, is cited to support the claim, but it does not

decide the question involved in this case, and is not in point. Plaintiff does not ask that the building of the bridge be enjoined, but seeks to prevent the appropriation of county funds for a purpose which he alleges to be illegal. It is well settled that a tax-payer may maintain an action in his own name to prevent unlawful acts by public officers, which would increase the amount of taxes he is required to pay, or diminish a fund to which he has contributed. 2 High, Inj., sec. 1560; *Hospers v. Wyatt*, 63 Iowa, 265; *Cornell College v. Iowa County*, 32 Iowa, 520; *Carthan v. Lang*, 69 Iowa, 384. In our opinion the claim of appellants is not well founded.

II. It is conceded by appellants "that the beds of all navigable waters in the western states belong to the

2. **—: powers** state wherein situated, and not to the
 of supervi- United States." See *Gilman v. Philadel-*
 ors: bridges *phia*, 3 Wall. 713, and cases therein cited.
 over naviga-
 ble lakes.

States have power to authorize the construction of bridges over navigable waters within their limits until congress intervenes and supersedes their authority. *Cardwell v. Bridge Co.*, 113 U. S. 205; 5 Sup. Ct. Rep. 423. It is not claimed that congress has ever assumed control of the lake in question. We are therefore required to determine whether the general assembly of Iowa has conferred upon boards of supervisors authority to build bridges across the navigable lakes within the state. Where not otherwise provided by statute, all

navigable waters of a state are public property for the use of all citizens, and cannot be obstructed without legislative sanction. *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. 185, and cases therein cited; *Commissioners v. Board of Public Works*, 39 Ohio St., 634; Gould, Waters, sec. 139, and notes. Section 303 of the Code authorizes boards of supervisors "to alter, vacate or discontinue any state or territorial highway within their respective counties; to lay out, establish, alter or discontinue any county highway heretofore or now laid out, or hereafter to be laid out, through or within their respective counties, as may be provided by law; to provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair." We understand counsel for appellants to rely upon these provisions as conferring upon boards of supervisors the authority in controversy. Section 1001 of the Code provides that "bridges erected or maintained by the public constitute parts of the highway, and must not be less than sixteen feet in width." It is evident that such a bridge cannot be constructed where a highway cannot be established. Before a highway can be established, the right to use the land over which it is to pass must be obtained for highway purposes. If it is not otherwise procured, notice of the proposed highway must be served on each owner or occupier of land lying within it or abutting thereon, as shown by the transfer books in the auditor's office, when such owner resides in the county, and it must also be published four weeks in some newspaper printed in the county. Code, sec. 936. Where such notice is not given, the highway cannot be established. *State v. Weimer*, 64 Iowa, 244; *State v. Anderson*, 39 Iowa, 275. It is well settled that no action or proceeding can be maintained against the state without its consent. *Chance v. Temple*, 1 Iowa, 201. It is not claimed that the provisions in regard to notice, to which we have referred, have any application to the state, and no steps have been taken to acquire a right to build the bridge

Snyder v. Foster.

in question as against the state. Appellants rest their case upon the general statutes applicable to highways and bridges. It is true that boards of supervisors have power to provide for the erection of all bridges "which may be necessary, and which the public convenience may require, within their respective counties," but they can provide for the erection of such bridges only in public highways. They may establish highways only "as may be provided by law." But the law does not authorize the establishment of a highway until the right to use the land over which it is to pass for that purpose has been obtained. In this case the state holds the title to the bed of the lake for the use and benefit of its citizens. It has not by express statute authorized any obstruction of such use. It was said in *Hickok v. Hine*, 23 Ohio St. 523, that "powers in derogation of the rights of individuals or of the public, conferred in general terms upon corporations or public officers, must be construed with some degree of strictness. Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words or by necessary implication. Such implication can arise only when requisite to the exercise of the power expressly granted, and it can be extended no further than the necessity of the case requires." The rule thus expressed seems to us to be sound, and supported by decisions of acknowledged authority and value. *Inhabitants of Charlestown v. County Commissioners*, 3 Metc. 202; *Commonwealth v. Coombs*, 2 Mass. 492; *Inhabitants of Springfield v. Railway Co.*, 4 Cush. 71; *Attorney General v. Stevens*, 22 Amer. Dec. 531.

Chapter 93 of the Acts of the Seventh General Assembly conferred upon the district courts power to authorize the construction of bridges across the navigable rivers of the state, and gave to county judges authority to erect bridges over streams at points where they were not navigable. That chapter was incorporated in the revision of 1860, with the act of the eighth general assembly, which provided for boards of supervisors,

Snyder v. Foster.

giving them the powers specified in the portions of section 303 of the Code which we have quoted. Revision, sec. 312. According to the ordinary rules of construction, the revision of 1860 gave to boards of supervisors no authority to build bridges over streams at places where they were navigable. The Code of 1873 dropped the provisions of the act of 1858, giving to the district courts jurisdiction to authorize bridges over navigable rivers, but enacted no substitute therefor. Boards of supervisors were, however, authorized to appropriate towards the construction of bridges across unnavigable rivers on county lines. Code, sec. 303, par. 24. They were also authorized to grant licenses for the erection of toll-bridges across any water-course or other obstruction which justifies the establishment of such bridge, in the language of section 1214 of the revision. Code, sec. 1003. But section 1215 of the revision, which authorized the construction of such bridges across navigable streams, seems to have been dropped. Boards of supervisors are authorized to designate the locations for, and any incorporated railway or bridge company may construct, railway bridges across the Mississippi, Missouri or Big Sioux river, under prescribed regulations. Code, sec. 1031. And certain cities may construct or aid in the construction of bridges over navigable boundary rivers. Chapters 13 and 98, Acts 21st Gen. Assem. Section 1265 of the Code authorizes railway corporations to construct and carry their railways across, over or under any water-course when it may be necessary in the construction of the same. But our attention has not been called to any statute which in terms or by necessary implication refers in any manner to the building of bridges over navigable lakes. The navigable waters referred to in the statutes are such as are found in "rivers," "streams" and "water-courses." Much can be said in favor of the proposition that the general assembly has reserved to itself absolute control of all the navigable waters of the state not found in boundary rivers, but as to that we need not determine. In our opinion it is clear that the power has not been

Albee v. Curtis & Morey.

delegated to boards of supervisors to construct bridges over the navigable lakes. The fact that the one in question was to be furnished with a draw for the passage of boats does not obviate the objection indicated. If constructed it would be an obstruction, even though not impassable. Since the construction of the bridge is contrary to law, county funds cannot be appropriated for that purpose. The decree of the district court is

AFFIRMED.

ALBEE V. CURTIS & MOREY.

Mortgage: RIGHT OF REDEMPTION FROM FORECLOSURE SALE: JUNIOR LIEN-HOLDER NOT MADE PARTY: STATUTE OF LIMITATIONS. Plaintiff claims title under a sheriff's deed upon the foreclosure of a mortgage which fell due January 1, 1877. On the same day defendants obtained a judgment lien on the land, but they were not made parties to the foreclosure. The deed under the foreclosure was dated September 19, 1879. In 1886, defendants caused execution to issue on their judgment, and the land to be sold thereunder, and they purchased it, taking a certificate of sale on the eighth of February, 1887. In this action by plaintiff to quiet his title, *held*—

- (1) That defendants' only right was to redeem from plaintiff, and that it was necessary to exercise that right within the ten years following January 1, 1877, after which their judgment ceased to be a lien on the land, under section 2882 of the Code. (See *Gower v. Winchester*, 33 Iowa, 303, and *Crawford v. Taylor*, 42 Iowa, 260.)
- (2) That their time for redemption was not extended, or their rights in any way enlarged, by the fact that the execution issued upon their judgment, and under which they purchased, was issued prior to January 1, 1887, the time when their lien expired, and their purchase of the land thereunder after that time.
- (3) That the said limitation of ten years was not prevented from running against defendants by the fact that during a portion of the time the persons who held the title under the foreclosure lived in another state; the provision of the general statute of limitations, that it shall not run during the non-residence of the debtor, having no application to the duration of a judgment lien. (See *Hendershott v. Ping*, 24 Iowa, 184.)

77	644
81	546
77	644
104	369

77	644
119	674

77	644
144	228

Appeal from Floyd District Court.—HON. JOHN B. CLELAND, Judge.

FILED, MAY 23, 1889.

THIS is an action in equity to quiet the title to one hundred and sixty acres of land in Floyd county. An answer was filed by the defendants, to which the plaintiff demurred. The answer was amended, and an amendment to the demurrer was filed. Thereupon the parties filed an agreed statement of facts. The demurrer to the answer was sustained, and judgment or decree was rendered for the plaintiff. Defendants appeal.

E. L. Smalley, for appellants.

Robert Eggert, for appellee.

ROTHROCK, J.—The agreed statement of facts appears to include every question in controversy in the case. The stipulation in which the facts are recited is, in substance, as follows: One C. D. Loper became the owner of the land in controversy in 1868. In 1872, Loper mortgaged the land to one Skinner, to secure the payment of fifteen hundred dollars, which mortgage became due January 1, 1877. On the twenty-ninth day of February, 1872, Skinner sold and assigned the mortgage to one Henry A. Dubois, who was then and afterwards, until his decease, a resident of the state of New York. On the eighteenth day of January, 1877, Dubois commenced an action to foreclose the mortgage. A decree of foreclosure was afterwards entered, and the land was sold upon foreclosure to said Henry A. Dubois, and a sheriff's deed was executed to him on the nineteenth day of September, 1879. Afterwards said Dubois died. On the tenth day of March, 1880, the heirs of Dubois, all of whom were non-residents of this state, sold and conveyed the land to one Emma F. Kellog; and

Albee v. Curtis & Morey.

on the twenty-second day of April, 1885, said Emma F. Kellog conveyed the same to the plaintiff, who soon thereafter went into possession of the premises, and since the commencement of the foreclosure proceedings the plaintiff and his grantors have paid all taxes on the land. On the twelfth day of October, 1876, Curtis, Stephenson & Morey, now Curtis & Morey, recovered a judgment against said Loper in an action before a justice of the peace in Butler county, in this state. A transcript of this judgment was duly filed and docketed in the office of the clerk of the circuit court of Butler county on the fourteenth day of December, 1876. On the first day of January, 1877, a transcript of said judgment was filed in the office of the clerk of the court in Floyd county. On the thirteenth day of December, 1886, an execution was issued on said judgment from the office of the clerk of the circuit court of Butler county to the sheriff of Floyd county; and on said thirteenth day of December the sheriff of Floyd county levied said execution upon the land in controversy; and on the eighth day of February, 1887, said sheriff sold the land in question to Curtis & Morey, the defendants in this action, and issued to them a sheriff's certificate of sale. The defendants were not made parties to the action for the foreclosure of the mortgage.

It must be conceded that the title of the plaintiff is complete and perfect unless the defendants have a right to redeem from the foreclosure sale by reason of being the holders of a junior judgment lien upon the land. It is claimed that such right is barred by the statute of limitations. The lien of defendants' judgment attached to the land on the first day of January, 1887. The mortgage upon which plaintiff's title is founded became due on the same day. The defendants had a lien upon the land for ten years from the date of the filing of the transcript in the clerk's office in Floyd county. It is provided by section 2882 of the Code that "judgments in the supreme, district or circuit court of this state, are liens upon the real estate owned by the defendant at the time

of such rendition, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment.”

It is claimed by counsel for appellants that, because execution was issued on the judgment before the ten years' limitation expired, and the land was afterwards sold, the lien of the judgment was thereby extended. We do not think this position can be sustained. The defendants acquired no title nor right, as against the plaintiff, by reason of the levy and sale, that they did not then possess by the judgment. The equity of redemption of the owner had been foreclosed years before, and the only right the defendants had was a right to redeem from the plaintiff or his grantors, and this was based upon the fact that defendants were not made parties to the decree of foreclosure. They had no other right than the right of redemption. They did not offer to redeem within ten years; and, for that matter, they do not now offer to redeem. Their rights are measured by the statute above cited. It is a lien for the period of ten years from the date of the judgment, and as to prior lien-holders the right to redeem is absolutely barred in ten years. *Gower v. Winchester*, 33 Iowa, 303; *Crawford v. Taylor*, 42 Iowa, 260.

It is further claimed in behalf of appellants that the ten years allowed for redemption is in the nature of a limitation of a right to redeem, and that as Henry A. Dubois, the assignee of the mortgage, who acquired the title to the land under the foreclosure sale, was a non-resident of this state (as well as his heirs), the time during which the title was held by him and his heirs should be excluded in computing the ten years' limitation. In other words, it is contended that the statute of limitations, as found in sections 2529 and 2533 of the Code, which provide that the time during which a defendant is a non-resident of the state shall not be included in computing the periods of limitation provided for in that chapter of the Code, applies to the judgment lien.

In our opinion this is a mistaken view of the law

 State ex rel. Phillips v. Fidelity & Casualty Co.

applicable to judgment liens. They are created by statute, and can continue no longer than the statute declares they shall continue, which is ten years. They expire and cease to be liens at the expiration of the time fixed, no matter where the residence of the parties in interest or the owners of the land may be. It is said in *Hendershott v. Ping*, 24 Iowa, 134, that "the mere lapse of time annihilates the lien" of a judgment. It would seriously affect titles of non-residents if it should be held that a junior lien of this kind does not expire by limitation, so long as the owner remains a non-resident. It appears to us to be very plain that the general statute of limitations can have no application in a case like this.

AFFIRMED.

THE STATE *ex rel.* PHILLIPS V. THE FIDELITY AND
CASUALTY COMPANY.

1. **Insurance Company: DOING UNLAWFUL BUSINESS: REMEDY.** Defendant is an insurance company organized under the laws of New York, and is alleged in the petition to have a certificate from the auditor of state authorizing it to do business in Iowa, but to be violating the laws of Iowa by making more than one of certain kinds of insurance. *Held* that *quo warranto* was the proper remedy, under section 8845 of the Code, to test its right to continue to transact such business, and not *certiorari* to review the act of the auditor in granting the certificate. (See opinion for statutes and cases cited and considered.)

2. **———: FOREIGN COMPANY: IOWA'S RETALIATORY STATUTE: INTERPRETATION AND ENFORCEMENT.** Section 1154 of the Code provides: "When by the laws of any other state any * * * prohibitions are imposed, or would be imposed, on insurance companies of this state doing, or that might seek to do, business in such other state, * * * so long as such laws continue in force the same * * * prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business within this state, * * *." The defendant is an insurance company of the state of New York, by the laws of which state all insurance companies, including those of Iowa, are prohibited from making more than one of several kinds of insurance in that state. But the defendant was doing business in this state, and making all of said kinds of insurance here. *Held* that it was violating the said section, and

77	648
118	99
77	648
129	541

State ex rel. Phillips v. Fidelity & Casualty Co.

was liable to be restrained in an action of *quo warranto*, without alleging or showing that the state of New York had ever actually enforced its law against an Iowa company which was attempting to violate it. The existence of the law there is sufficient to put its prohibitions in force here, through the section above quoted. Nor does it make any difference that Iowa companies are prohibited by the laws of Iowa from making more than one of the said kinds of insurance in Iowa. The only question is,—does New York impose prohibitions on Iowa companies? If so, the same prohibitions are imposed in return as against New York companies.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MAY 23, 1889.

THE defendant company is a corporation organized and existing under the laws of the state of New York. It has received from the auditor of this state a certificate under the provision of the law as to insurance companies, and is doing business in this state in the following classes or lines of insurance: (1) Against injury, disablement or death of persons, resulting from traveling, or general accidents by land or water; (2) the fidelity of persons holding places of public or private trust; (3) upon plate-glass, against breakage; (4) upon steam-boilers, against explosion, and against loss or damage to life or property resulting therefrom. By the law of the state of New York insurance is classed in departments, and the kinds above specified are in the second department, and the law of that state provides that no company shall undertake to do more than one of the kinds of insurance mentioned in the second department; and it further provides that no company organized under the laws of any other state shall undertake to do more than one of such kinds of insurance in the state of New York. The petition alleges that the defendant has continually, since the first day of February, 1888, offended, and still offends, against the law of this state by making more than one of the kinds of insurance above specified; and the petition asks that the defendant be ousted and excluded from doing any of such kinds of insurance.

State ex rel. Phillips v. Fidelity & Casualty Co.

There was a demurrer to the petition, which was overruled, and a judgment entered that the defendant be excluded from attempting to carry on more than one of the kinds of insurance; from which judgment the defendant appeals.

Mitchell & Dudley, for appellant.

Macy, Sweeney & Jones, for appellee.

GRANGER, J.—I. The first question presented by the demurrer goes to the jurisdiction of the court, on the ground that *certiorari*, and not *quo warranto*, is the plaintiff's remedy. The argument is upon the theory that the act of the auditor in granting the certificate is *quasi* judicial, and that this proceeding, in effect, is to review his action. Without reference to the point in argument as to the office of the common-law writ of *quo warranto*, we think the statute is conclusive of the question. The writ of *certiorari* is permitted whenever specially authorized by law, and especially when an inferior officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when, in the judgment of the superior court, there is no other plain, speedy and adequate remedy. Code, sec. 3216. It will be noticed that there is a plain limitation upon the use of this writ, and before granting it the court must inquire if there is any other plain, speedy or adequate remedy, and, if so, the writ is not available. It may be said that the auditor is not alleged to have exceeded his jurisdiction, or that he has acted illegally; and he is not a party to this proceeding. The action seems to proceed upon the theory that, notwithstanding the certificate of the auditor, the corporation is acting in violation of law, in such manner as to forfeit its rights as a corporation, and that the legislature has in terms provided a remedy that seems to be plain, speedy and adequate. Chapter 6, title 20, of the Code is designed especially to "test official and corporate rights," the latter of which is the very gist of

1. INSURANCE
company: do-
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business: rem-
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this proceeding. Section 3345 provides that "a civil action by ordinary proceeding may be brought in the name of the state as plaintiff in the following cases: * * * (3) Or against any person acting as a corporation within this state, without being authorized by law; (4) or against any corporation doing or omitting acts which amount to a forfeiture of its rights and privileges as a corporation, or exercising powers not conferred by law." The allegations of the petition are clearly within the purview of the quoted provisions of the statute, by averring that the defendant, by the making of the several kinds of insurance, has been and is still offending against the laws of the state. If thus offending, it must certainly be exercising powers not conferred by law. In support of the claim that *certiorari* is the proper remedy, we are referred to the case of *Jordon v. Hayne*, 36 Iowa, 9. That case arose under the law providing for townships voting aid to railroads in their construction, and it is held that *certiorari* is the proper proceeding to review the proceeding of the board of trustees in calling the election. The acts of the board in such cases are judicial, and no appeal was provided; hence a review in such cases by *certiorari* is in accord with the very letter of the law, there being no other plain, speedy or adequate remedy. If there had been provision for an appeal in such cases, or another remedy specified by law that was plain, speedy and adequate, such a holding would hardly have been. The cases of *Stubenrauch v. Neyenesch*, 54 Iowa, 567; *Smith v. Powell*, 55 Iowa, 215; *Darling v. Boesch*, 67 Iowa, 702, —and other cases cited, in no manner militate against this view, but are in accord with it.

II. The second division of the demurrer is in these words: "Because the petition of plaintiff nowhere

shows or alleges that any insurance company, incorporated or organized under the laws of the state of Iowa, for the transaction of business of insurance, has ever sought to do business in the state of New York, and been refused or precluded from doing business in

2. — : foreign company : Iowa's retaliatory statute: interpretation and enforcement.

State ex rel. Phillips v. Fidelity & Casualty Co.

said state of New York.” Referring to the statement of facts, it will be noticed that by the laws of New York a corporation organized under the laws of any other state is precluded from making in that state more than one of the kinds of insurance being made by defendant in this state. Section 1154, of the Code of Iowa provides: “When by the laws of any other state any taxes, fines, penalties, licenses, fees, deposits of moneys or of securities, or other obligations or prohibitions, are imposed or would be imposed on insurance companies of this state doing, or that might seek to do, business in such other state, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business within this state, or upon their agents here.” The demurrer presents the question that the petition does not show that any Iowa company has ever sought to do business in New York and been refused. We could see no purpose in such an allegation other than that the people of New York not only enacted laws, but sought their enforcement; and we think it only fair to presume that fact without the allegation, and it is quite probable that as to Iowa companies the law itself is a sufficient restraint. But the ground of the demurrer does not reach a question in the case. It is not the enforcement of the law of New York against Iowa companies that gave rise to the “retaliatory” law of Iowa; but “when by the laws of another state * * * prohibitions are imposed, or would be imposed, upon insurance companies of this state doing, or that might seek to do, business in such other state,” than the law of that state as against Iowa companies exists in this state against its companies. The law of New York in terms prohibits an insurance company organized under the laws of Iowa from making in New York more than one of the kinds of insurance made by the defendant in this state, and that law of itself places on the statute book of Iowa the law that the defendant, being an insurance company organized under the laws

State ex rel. Phillips v. Fidelity & Casualty Co.

of New York, can make but one of such kinds of insurance in this state. It is not important nor necessary to the existence of the law here that an Iowa company should go to New York to test the sincerity of the people in the enforcement of her laws; nor is such a step necessary to the enforcement of the law in this state. A spirit of comity between the states should induce a belief that their laws are made in good faith, and for observance. The sting of the adder may be necessary in some cases, to avoid encroachments, but such necessity is not the result of a law or rule of action. See *Phoenix Insurance Co. v. Welch*, 29 Kan. 672; *Home Insurance Co. v. Swigert*, 104 Ill. 653.

It is urged in argument that a company organized in Iowa could only make one of such kinds of insurance here, because it would be prohibited from doing more by our laws, and hence the laws of New York would not prevent it from doing in that state what it could do in this under Iowa law. But we fail to see how that reaches the question. It is not the question if New York does as well by Iowa insurance companies as Iowa itself does, but does New York deny privileges to Iowa companies, or, perhaps, in better terms, does it impose prohibitions? If so, the same prohibitions are imposed in return as against New York companies. By the demurrer the fact of such prohibitions is admitted, and we think the defendant can legally make but one of the kinds of insurance in this state. It is not necessary to consider the third ground of the demurrer, as under this holding the judgment of the district court must be

AFFIRMED.

WEST V. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1. **Railroads: FIRES FROM ENGINES: RULE OF CONTRIBUTORY NEGLIGENCE DOES NOT APPLY.** In an action against a railroad company for damages caused by fire set out on its right of way by an engine, the defendant cannot escape liability for its own negligence, even though it appears that the plaintiff was negligent also, and that his negligence contributed to the loss. Under section 1289 of the Code, the doctrine of contributory negligence does not apply. (*Small v. Railway Co.*, 58 Iowa, 838, *distinguished*.) This point was affirmed upon a rehearing.
2. ———: ———: **INSTRUCTION AS TO EVIDENCE.** In such case the court instructed: "If you find from the evidence that the engine which set out the fire set out several successive fires on the same day and same trip, this should be regarded as evidence that the engine was not properly constructed, or in good repair, or was improperly used." *Held* that it was not open to the objection that it went too far in instructing as to the effect of the evidence; nor to the objection that it referred to "several" successive fires,—since the evidence showed that there were two besides the one complained of; nor to the objection that the court erred in singling out this evidence, and thus giving it emphasis,—although the practice of so doing is ordinarily not to be commended.
3. ———: ———: **OWNERSHIP OF BURNED HAY: EVIDENCE.** Where in such action the property burned was stacks of hay, and the evidence was conflicting as to whether plaintiff was the sole owner of it; it was the duty of the jury to determine the conflict and render a verdict, though there might be some doubt about it; and an instruction that the plaintiff could not recover if the evidence left that question in doubt was properly refused.
4. **INSTRUCTIONS: REFUSAL: ERROR WITHOUT PREJUDICE.** The refusal to give an instruction, which in a strained but conceivable view of the case ought to have been given, is not reversible error. The court may trust somewhat to the common sense of the jurors.

Appeal from Cedar District Court.

FILED, DECEMBER 13, 1887.

ACTION to recover for damages sustained by a fire alleged to have been set out by the defendant in the operation of its road. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Hubbard, Clark & Dawley, for appellant.

Piatt & Carr and *Charles E. Wheeler*, for appellee.

ADAMS, C. J.—I. The court gave an instruction in these words: "You will determine from the evidence whether the defendant permitted such an accumulation of dry grass and weeds and other combustible matter within its right of way, exposed to ignition by their engines, as would be permitted or done by an ordinarily prudent man upon his own premises, if exposed to the same hazard from fire as an accumulation of dry grass and weeds upon the right of way of the defendant. If you find that the defendant in this respect acted as an ordinarily careful and prudent man would have done under the same circumstances, then it is not in law guilty of negligence in thus acting. But if the evidence fully satisfies you that the defendant did in fact permit such an accumulation of combustible matter, as above mentioned, upon its right of way, as would not have been permitted by an ordinarily prudent man upon his own premises, if exposed to the same hazard from fire escaped from an engine operated by the defendant setting fire to the accumulated grass and weeds within the right of way of the defendant's road, in consequence of which the plaintiff's property was destroyed, then the defendant is liable." The defendant assigns the giving of this instruction as error. It is insisted that there is no evidence that the fire started in the right of way, and no evidence even that there was combustible material there. We think that the testimony of Jasper West and Rosa West tended to show that the fire started in the right of way. The former said: "When I got there it was half way between the track and the fence." It is true that he said that when he first saw it he could not tell where it was; but he was not at the right of way when he first saw the fire, but afterwards went there. Now if the fire caught in the right of way, that fact of itself would be some evidence that there was combustible material there.

West v. The Chicago & N. W. Ry. Co.

One other question may be disposed of in connection with the instruction above set out, though the

1. RAILROADS:
fires from en-
gines: rule of
contributory
negligence
does not ap-
ply.

question is raised under an instruction asked by the defendant, and refused. The property burned consisted of stacks of hay. The plaintiff had not plowed around them, and the defendant averred that he was guilty of negligence in not so doing. The evidence was such that we think that the jury might have so found. The instruction above set out made the defendant liable, if negligent, regardless of the question of the plaintiff's negligence. We have, then, the question as to whether, in a case of this kind, arising under the statute (Code, sec. 1289), the defendant can escape liability for its own negligence, if it appears that the plaintiff was negligent also, and that his negligence contributed to the loss. The defendant contends that it can. It may be conceded that, prior to the statute, contributory negligence on the part of the plaintiff in a case like this would defeat his recovery. *Kesee v. Chicago & N. W. Ry. Co.*, 30 Iowa, 78. But the statute, we think, changes the rule. It is doubtful, indeed, whether even at common law the preponderance of authority is not against the ruling in the case above cited; but it is not material to inquire whether this is so or not. The statute, we think, was designed to settle a vexed question upon which the courts had been divided. The language used is clear. In construing the statute in *Small v. Chicago, R. I. & P. Ry. Co.*, 50 Iowa, 338, a minority of the court thought that the company could not escape liability in any way, not even by showing itself free from negligence, and that the loss was due wholly to the negligence of the plaintiff. We are now asked to go an important step further than the majority went in that case. In our opinion, we should not be justified in doing so. It is claimed that language was used by way of argument, in the opinion in *Small's case*, inconsistent with the liability of the company for setting out fires where the plaintiff was guilty of contributory

negligence; but what was said was said by way of argument against the liability of the company, as claimed by plaintiff, where the loss occurred solely through the plaintiff's negligence.

II. The court gave an instruction in these words: "If you find from the evidence that the engine which set out the fire in question set out several successive fires on the same day and same trip, this should be regarded as evidence that the engine was not properly constructed or in good repair, or was improperly used." The giving of this instruction is assigned as error. The defendant insists that the court went too far in saying that the jury should regard the fact of setting out other fires as negligence. It contends that the rule is that the jury are at liberty to regard it as evidence. Its argument is that it was shown that the season was unusually dry, and that the jury should have been at liberty to attribute wholly to the dryness of the season the fact that other fires were set out. We have to say, however, that we do not think that the instruction is open to the objection made. Whatever is admitted as evidence should be regarded by the jury as evidence. This is not inconsistent with the fact that they may regard it as overcome or explained away by other evidence.

It is further urged as an objection to the instruction that it assumes that the jury might find that there were several successive fires set out by the engine on that trip, whereas it is said that there were only two, and that two is not several. It may be conceded that "several" means more than "two;" but we think that the evidence showed that there were two besides the one which did the injury, and it is claimed by the plaintiff that there was evidence tending to show that there were more than that.

It is further urged as an objection to the instruction that the court had no right to single out this evidence, and instruct upon it, and give it additional emphasis by so doing. But we cannot reverse because the court told the jury that they should regard as evidence what

West v. The Chicago & N. W. Ry. Co.

in fact is evidence, and what the jury must necessarily regard as such. The practice of emphasizing evidence by an instruction is not, we think, as a rule to be commended. Sometimes, doubtless, the court may properly call the attention of the jury to evidence which is obscure and might escape their attention. The court should exercise a wise discretion in this matter; and we think that this is all that can properly be said.

III. There was evidence tending to show that the plaintiff was not the sole owner of the hay burned. As

8. —: —: applicable to this point the defendant asked
ownership of
 burned hay:
 evidence. an instruction as follows: "The plaintiff cannot recover in this action for the stacks burned, because the evidence does not show definitely what his interest in the hay was, and verdicts cannot be based upon guess work, but must have evidence to sustain them. If you find that the evidence does not show what the plaintiff's interest in the stacks was, but leaves the same in doubt, then he cannot recover anything for the stacks." The court refused to so instruct, and the defendant assigns the refusal as error. While there was evidence tending to show that the plaintiff was not the sole owner, there was other evidence tending to show that he was. Now, it was for the jury to reconcile this evidence as best they could, and render a verdict upon it, notwithstanding there might be some doubt about it. We think that the instruction was properly refused.

IV. The defendant asked an instruction in these words: "The burden of proving that the fire started on

4. INSTRUCTIONS:
refusal: error
 without prej-
 udice. the defendant's right of way is upon the plaintiff, and he cannot recover on the ground that the defendant was negligent in

regard to its right of way, unless he affirmatively shows by a preponderance of the evidence that the fire started on said right of way." The court refused to give this instruction, and the defendant assigns the refusal as error. It seems possible, under the evidence, that the defendant was negligent in leaving combustible material on the right of way, and yet that the fire did not originate there, and that the combustible material had nothing to

West v. The Chicago & N. W. Ry. Co.

do with the loss. But the danger that the jury might find the defendant liable in such case by reason of the combustible matter was not, we think, such as to render it reversible error to refuse the instruction. The court might trust somewhat to the common sense of the jurors. We see no error in any of the rulings.

AFFIRMED.

OPINION ON REHEARING.

FILED, MAY 24, 1889.

BECK, J.—I. A rehearing was granted in this case upon the petition of defendant. The question upon which we desired further argument is whether the rule of contributory negligence is applicable to cases wherein railroad companies are liable under the statutes for fires set out in the operation of their railroads. Upon the other questions in the case we had no doubt, and did not order the rehearing to gain more light upon them. We need not further discuss them. The foregoing opinion is criticised for the course of its argument, rather than assailed because of its conclusions. What is said as to the purpose of the statute "to settle a vexed question upon which the courts had been divided" may or may not be accurate. But it is very true that the statute was intended to prescribe a rule of law. Whether there had been contests as to the prior rules recognized by the courts will not determine the construction of the statute. The statute imposes an absolute liability upon railroad corporations, without regard to their negligence, or the contributory negligence of the person injured. This court has no right to interpolate words in the statute which limit that liability to cases wherein the injured person does not contribute to the injury by his own negligence. Surely, the language of the statute, without interpretation, will admit of no such construction. But it is said that this court has held in *Small v. Railway Co.*, 50 Iowa, 338, that the railroad company is

not liable, if it shows affirmatively that it was not guilty of negligence. It does not follow that because this court has gone so far it must go still farther, and limit the liability on another ground, namely, the contributory negligence of the person injured. There is an obvious distinction between the limit fixed by *Small v. Railway Co.* and the limit proposed in this case. In the first, it is a limit fixed by proof of want of negligence; in the other, it is a limit fixed by proof of contributory negligence. It may be well to hold that one who is not negligent should not be liable; but it is absurd to say that under this statute, fixing absolute liability, the fault of the railroad company being shown or being presumed, it is not liable because of the fault of the plaintiff. It will be seen that, as is said in the foregoing opinion, we are asked to take a step far in advance of *Small v. Railway Co.*

It cannot be said that the doctrine of contributory negligence is founded upon the rule that one wrong-doer cannot recover of another engaged with him in the commission of the wrong for injuries resulting therefrom. It cannot be said that defendant and plaintiff, both being negligent, united in the commission of the wrong. The defendant's negligence was positive,—active. The plaintiff's was negative, and consisted in a failure to exercise due care to prevent injuries from defendant's negligence. The reasons demanding the rule recognized in *Small v. Railway Co.* do not demand that the rule of contributory negligence be extended to this case. In our opinion the cases cited by counsel for defendant do not support his contention that the doctrine of contributory negligence should be applied in this case. We adhere to the foregoing opinion.

AFFIRMED.

ENGLE V. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. **Railroads: NEGLIGENT FIRES. PRESUMPTION OF LIABILITY: PLEADING AND PROOF.** When an injury has been occasioned by fire set out in the operation of a railroad, the presumption is that the company is guilty of negligence (Code, sec. 1289; *Small v. Railway Co.*, 50 Iowa, 838); or, in other words, that it is liable for the injury. Hence, in an action to recover for such injury, it is only necessary to allege and prove the injury and that it was caused by a fire so set out. And an allegation of negligence in the petition is merely redundant matter, and need not be proved. (Code, sec. 2729.) And after plaintiff has so alleged and proved, it is incumbent on the defendant not only to show want of negligence on its part in the operation of its road, but also in the matters which were the immediate cause of the injury,— as, for example, in keeping its right of way free from dry grass, in which the fire in this case started.
2. ——— : ——— : **CONTRIBUTORY NEGLIGENCE: INSTRUCTION.** In an action to recover for an injury caused by a fire set out by a locomotive, the court instructed as follows: “If plaintiff’s own negligence directly and proximately contributed to his own injuries, then he cannot recover; but, in order to defeat his right of recovery, there must be such contributory negligence on his part as directly and proximately contributed to produce the injuries, and without which his loss would not have been sustained.” *Held* that, while the last clause of the instruction may not express the rule as settled by the holdings of this court, it could not have prejudiced defendant, since it was held in *West v. Railway Co.*, ante, p. 654, that, under section 1289 of the Code, the right of recovery in a case of this kind would not be defeated by the mere contributory negligence of the injured party.
3. ——— : ——— : **DEGREE OF CARE REQUIRED: INSTRUCTIONS.** The presumption of law, that where an injury is done by a fire set out in the operation of a railway the company is guilty of negligence, is overcome by proof that the company was in the exercise of ordinary care and diligence; and although from one clause of an instruction the jury might have inferred that the company was liable for the consequences of but slight negligence, yet where the whole taken together expressed the correct rule, and it was clearly set forth again in another instruction, the clause referred to is no ground for a reversal.

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, MARCH 9, 1888.

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84	450
77	661
90	151
77	661
91	484
77	661
98	231
77	661
107	234
77	661
111	385
77	661
119	32
77	661
1144	349

ACTION to recover the value of certain property, which was destroyed by a fire set, as is alleged, by the operation of defendant's railway. Judgment for plaintiff, and defendant appeals.

Mills & Keeler, for appellant.

B. F. Heins and *Smith & Powell*, for appellee.

REED, J.—I. It is alleged in the petition that defendant negligently permitted a large amount of dry grass and herbage to accumulate and remain in its right of way, and that fire was communicated to the same from a locomotive which was being run upon the track, and that the fire set out spread upon plaintiff's premises and destroyed the property in question. It is also averred that defendant was guilty of negligence in the operation of its road, whereby the fire was set out and the property destroyed. On the trial, plaintiff proved the destruction of his property by fire, and the amount of his damages. He also introduced evidence tending to prove that the fire, which caused the damage, was set out by a locomotive and train of cars, which passed upon defendant's railway shortly before the fire was discovered. He then rested, and defendant introduced evidence which tended to prove that the locomotive which it was claimed set out the fire was equipped with such appliances for preventing the escape of fire as were in general use by the railroads of the country, and that the same were in good state of repair, and that it was operated in a skilful and careful manner. Plaintiff was then permitted, against defendant's objection, to introduce evidence tending to prove that the locomotive had set out a number of other fires on the same trip; also that there was an accumulation of dry grass and herbage on the right of way at the point where the fire started, and that it originated in that material. The superior court also instructed the jury that plaintiff was required, in making out his case originally, to prove the

1. RAILROADS :
negligent
fires : pre-
sumption of
liability :
pleading and
proof.

Engle v. The Chicago, M. & St. P. Ry. Co.

injury and damage alleged, and that the fire which caused it was set out by defendant in the operation of its railroad, and that, if he had established those facts, the burden was cast upon defendant to show that it was not guilty of negligence or want of ordinary care in the matter. These rulings were assigned as error, and it was contended (1) that plaintiff, having alleged that defendant was guilty of negligence, in permitting the combustible material to accumulate and remain on the right of way, and in the operation of its locomotive, he voluntarily assumed the burden of proving that allegation; and (2) if defendant's only negligence consisted in permitting the combustible material to accumulate and remain on the right of way, which the jury might have found under the evidence, as such negligence did not pertain to the operation of the road, the burden of proving it was upon plaintiff; the position of counsel being that the presumption of negligence, which arises from the occurrence of the fire, relates only to the operation of the road; and hence it is contended that the court erred, both in permitting plaintiff to introduce evidence to establish that averment for the first time in rebuttal, and in the instructions given. But, in our opinion, neither of these positions is correct.

When an injury has been occasioned by fire set out in the operation of a railroad, the presumption is that the corporation operating the railroad was guilty of negligence. Code, sec. 1289; *Small v. Railway Co.*, 50 Iowa, 338. As, therefore, the occurrence of the injury is made *prima-facie* evidence of negligence, it is sufficient for the plaintiff in such cases to set forth simply its occurrence in his pleading. The allegation of negligence in plaintiff's petition was therefore redundant; for proof by him of such negligence was not essential to his right of recovery, and the fact that his pleading contained an unnecessary averment does not change the rule as to the *quantum* of proof he is required to make. "A party shall not be compelled to prove more than is necessary to entitle him to the relief asked for." Code, sec. 2729. The presumption which arises, upon proof of

the occurrence of the injury is, in effect, a presumption of liability; for the ground of liability is the negligence of the party whose act caused the injury; and to say that a presumption of negligence arises upon proof of the occurrence of the injury is in effect but to say that the party is presumptively liable for the injury. The presumption which arises, then, under the statute, is a presumption of liability on the part of a railroad company for the damages caused by fire set out by it in the operation of its railroad; and it is manifest that such presumption is not necessarily overcome by the proof merely that the company was not negligent in the operation of the road; for if the fire was set out in the operation of the road, but the injury was occasioned by its negligence in some matter not pertaining to its operation, still it is liable. And, as the presumption of liability arises on proof of the injury, it can be overcome only by proof that the company was not guilty of negligence in the matters which were the immediate cause of the injury.

II. It was shown that plaintiff had taken no precautions to protect his property from fire which might be set out by defendant in the operation of its road, and it was claimed that, for that reason, he was guilty of contributory negligence, and consequently could not recover for the injury. The superior court gave the following instruction as applicable to this branch of the case: "If plaintiff's own negligence directly and proximately contributed to his own injuries, then he cannot recover; but, in order to defeat his right to recover, there must be such contributory negligence on his part as directly and proximately contributed to produce the injuries, and without which his loss would not have been sustained." Exception is taken to the last clause of the instruction; and it may be conceded that the language of the clause does not express the rule on the subject as settled by the holdings of this court; but in *West v. Railway Co.*, ante, p. 654, we held that, under the statute (Code, sec. 1289), the right of recovery in a case of this kind

2. — : — :
contributory
negligence :
instruction.

Engle v. The Chicago, M. & St. P. Ry. Co.

would not be defeated by the mere contributory negligence of the injured party. Under that holding, defendant could not have been prejudiced by the instruction in question.

III. The superior court gave the following instruction, to which exception is taken: "In order for the defendant to escape from the liability to pay the plaintiff's damages, as set out in the preceding instruction, it is incumbent on the defendant to establish, by preponderance of the evidence, either one or both of the following propositions:
 * * * (2) *That the defendant was in nowise negligent or in fault in setting out or causing the fire which destroyed plaintiff's property*, and, so far as causing said fire was concerned, it operated its railway in a reasonably careful and prudent manner." The exception taken to the instruction is that, by the italicized language, defendant is held liable for the consequence of but slight negligence, whereas the rule is that it is held to ordinary care and diligence in the matter complained of. If the italicized portion of the instruction was to be considered alone, perhaps it could be said to be vulnerable to the objection urged. But, when the whole instruction is considered, it expresses the rule as claimed by counsel. And, in a subsequent instruction, the jury were explicitly directed that the presumption, which arises on proof of the occurrence of the injury, would be overcome by proof that defendant was in the exercise of ordinary care and diligence at the time the fire was set out. With this explicit direction before them, we think the jury could not have been misled by the language excepted to.

Exceptions are taken to other rulings of the court on the trial, but we do not regard the questions raised as of controlling importance, and, without setting them out, we deem it sufficient to say that the rulings appear to us to be correct. The judgment will be

AFFIRMED.

OPINION ON REHEARING.

FILED, MAY 24, 1889.

GRANGER, J.—An important point in this case, touching the question of contributory negligence, was ruled on the authority of *West v. Railway Co.*, *ante*, p. 654. In that case a rehearing was granted for the purpose of further considering the question of contributory negligence in this class of cases. The rehearing in this case was granted with no other view than to further consider that question. At this term an opinion is filed in that case (*ante*, p. 659) adhering to the former opinion, and, as a result, the judgment in this case must, as before announced, be **AFFIRMED.**

JOHNSON *et al.* v. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1. **Evidence : TITLE TO HAY MADE ON LEASED LAND.** In an action to recover for the burning of hay made on leased land, plaintiff's title to the hay is shown, *prima facie*, when he has shown that he leased the land and made the hay, and was in possession of it at the time it was destroyed. He is not required, in the absence of an adverse claim to the hay, to prove the title of his landlord.
2. **Railroads : NEGLIGENT FIRES : EVIDENCE OF ORIGIN.** Where the evidence showed that after defendant's engines had passed the fires were discovered in the grass, and it was not shown that they could have arisen from any other source, the jury was warranted in finding that they were caused by the engines.
3. **——— : ——— : EVIDENCE AS TO CONDITION OF ENGINES.** When one of defendant's witnesses testified that an engine in good repair could not throw fire the distance from the track to the place the fire caught in the grass, and the fires could have originated from no other source, the jury was warranted in finding that the engines which passed just before the fire were out of repair.
4. **——— : ——— : CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.** The rule that contributory negligence will defeat a recovery for an injury, as recognized by this court, does not, under section 1289 of the Code, apply to a person injured by a fire set out in the operation of a railroad. (See *West v. Railway Co.*, *ante*, p. 654.)

77	666
87	388
77	666
111	182

Johnson v. The Chicago & N. W. Ry. Co.

5. **Damages :** FOR DESTRUCTION OF PERSONAL PROPERTY. The measure of damages for the negligent destruction of personal property is the value of the property at the time of destruction, with interest at six per cent. per annum to the date of judgment. (*Brentner v. Railway Co.*, 68 Iowa, 580, *distinguished.*)

Appeal from Sac District Court.—HON. J. P. CONNER,
Judge.

FILED, MAY 24, 1889.

ACTION to recover for hay burned by fires set out by engines operated upon defendant's railroad. There was a judgment upon a verdict for plaintiffs. Defendant appeals.

Hubbard & Dawley, for appellant.

R. M. Hunter, for appellees.

BECK, J.—I. Counsel for defendant insist that the plaintiffs failed upon the trial to show that they owned the hay for the burning of which the action is brought, and that an instruction to the jury asked by defendant, directing a verdict on that ground, ought to have been given. We think the instruction was rightly refused. The testimony tends to show that plaintiffs had leased the land from one who they understood was the owner, and had cut and stacked the hay thereon. The land was unbroken prairie, but was wholly or partly fenced. The persons of whom the plaintiffs leased had other tenants on the same tract. There is no evidence of any kind tending to show that any other persons besides plaintiffs held or set up title, or claimed title, or the right of possession to the land. Surely, this evidence showed *prima facie* plaintiffs' title to the hay. They were in possession of the land under claim of right, and were in the possession of the hay when it was burned. This, in the law, is *prima facie* evidence of ownership of the hay. It would surely be a harsh and unheard-of rule to require a tenant, seeking

1. EVIDENCE:
title to hay
made on
leased land.

to recover the value of the products of the land he leases, in the absence of any adverse claim thereto, to establish the title of his landlord. This is just what counsel insist upon in this case.

II. It is next insisted that there was no evidence tending to show that the hay was destroyed by fires escaping from engines used on defendant's road. The evidence shows that soon after the engines had passed, the fires were discovered. It is not shown that the fires could have possibly originated from any other source than from engines on defendant's road. In view of these facts, it cannot be said that there was no evidence from which the jury could rightly infer that the defendant's engines set out the fires.

2. RAILROADS:
negligent fires:
evidence of
origin.

III. Counsel for defendant maintain that there is an utter failure of proof that the defendant's engines, said to have set out the fire, were negligently handled or were not in good repair and condition. In reply to this position it need only be said that one of defendant's witnesses, a locomotive engineer who was in charge of one of the engines from which it is claimed the fire escaped, testified that an engine in good repair could not throw fire the distance from the track to the place the fire caught in the grass. As has been said, the fires could have originated from no other source. The jury were authorized to infer from this evidence that the engines were not in good repair.

3. —: —:
evidence as to
condition of
engines.

IV. Counsel for defendant urge that plaintiffs ought not to recover in the action, for the reason that their own negligence contributed to the injury. We have recently decided that, under the statute (Code, sec. 1289) making railroad corporations liable in cases of this character, the rule of contributory negligence recognized by this court does not apply. See *West v. Railway Co.*, ante, p. 654. That case was pending about the time the one now before us was submitted for decision, and the arguments therein were referred to by counsel in this

4. —: —:
contributory
negligence of
person
injured.

 Andrews v. The Mason City & Ft. D. Ry. Co.

case. We have discovered no grounds for changing our conclusions upon the question.

V. The district court directed the jury that, to determine the damages which plaintiffs are entitled to recover, they should add to the value of the hay, at the time it was destroyed, six per cent. per annum interest, and the sum should be the amount of their verdict.

5. DAMAGES:
for destruction of personal property.

Counsel for defendant object to the instruction, so far as it allows interest to be added. We think it is a correct and just rule for determining the measure of damages in cases of this character. The object of the law in awarding damages is to render to the injured party just and full compensation. The defendant was deprived of his property by the fire. He was entitled at that moment to recover its value. He ought to have the legal interest for the time compensation was withheld from him. When personal property is destroyed, the measure of damages is fixed by this rule. See Field, Dam., p. 619, sec. 781 and note. *Brentner v. Railway Co.*, 68 Iowa, 530, is not in conflict with our conclusion on this branch of the case. The statute under which that action was prosecuted fixed the measure of damages. It was therefore rightly held that these damages could not be increased by adding interest thereto. The foregoing discussion disposes of all questions in the case argued by counsel. The judgment of the district court is

AFFIRMED.

 ANDREWS V. THE MASON CITY AND FORT DODGE
RAILWAY COMPANY.

1. **Railroads: INJURY BY FRIGHTENING TEAM: KINDS OF NEGLIGENCE TO BE CONSIDERED.** Plaintiff's team was frightened and he was injured, while attempting to drive past defendant's engine which was standing in the street of a town. The horses were frightened by a discharge of steam as they were passing. *Held*, in an action to recover, that the court properly refused to restrict the jury to the consideration of defendant's negligence in discharging the steam, and submitted to them the question of negligence in keeping the engine on the street for an undue time.

77 669
115 845

77 669
134 377

Andrews v. The Mason City & Ft. D. Ry. Co.

2. ——— : ——— : CONTRIBUTORY NEGLIGENCE : EVIDENCE. In such case, where there was a legitimate inquiry as to whether plaintiff ought not, as a prudent man, to have taken another route by crossing the track, the court properly admitted evidence as to the height of the track at the place where it was claimed he ought to have crossed.
3. ——— : ——— : FIREMAN IN CHARGE OF ENGINE : EVIDENCE : INSTRUCTION. Where the evidence was that the engineer was absent from the engine at the time of the injury, and that, when he went away he said to the fireman, " Watch her,"—the engine at the time standing in the street of a town,—and the fireman while " watching her " discharged the steam which frightened plaintiff's horses and caused the injury, *held* that the jury was justified in finding that he was in charge of the engine, though the engineer testified that he was not left " in charge ;" and that the court was justified in instructing that defendant was liable if the fireman, while so in charge, negligently discharged the steam.
4. Instructions : REFUSAL TO GIVE : NO PREJUDICE. Although an instruction asked is correct, there is no prejudice in refusing it when another is given on the same point equally, if not more, favorable to the asking party.
5. ——— : SPECIAL INTERROGATORIES : FAILURE TO ANSWER. A failure on the part of the jury to answer special interrogatories is not necessarily a ground for setting aside the verdict, when they do not call for facts without which the verdict cannot be sustained.
6. Pleading : AMENDMENT TO CONFORM TO PROOFS. An amendment of the petition to make it conform to the evidence is properly allowed at the close of the testimony.

Appeal from Webster District Court.—HON. JOHN L. STEVENS, Judge.

FILED, MAY 24, 1889.

ACTION for personal injury caused by a train on defendant's road. Judgment for plaintiff and defendant appeals.

A. N. Botsford, for appellant.

Chase & Chase, for appellee.

GRANGER, J.—The defendant's road passes along Main street in the town of Lehigh some four hundred feet, and in that distance it makes diagonally across the

Andrews v. The Mason City & Ft. D. Ry. Co.

street. This street is the principal business street of the town. On the day of the injury complained of the defendant's engine stood in the street at a point on its track, so as to leave a distance of about fifteen feet between the engine and the edge of the sidewalk on the west side of the street. The plaintiff was in the act of taking a trunk from the depot to a store on the west side of the street with his team and wagon. To reach the store by going on this street he must pass the engine. To reach the store by passing the engine on the east would necessitate crossing the defendant's track, which stood from ten to twelve inches above the surface of the street, and with a team and wagon, with only a trunk, it could be crossed. The plaintiff drove past the engine on the west side, and, while passing, the person on the engine caused a discharge of steam on that side, on account of which the team took fright, ran the wheels of the wagon against the sidewalk, threw the plaintiff from the wagon, and severely injured him. The negligence charged against the defendant company is (1) allowing the engine to remain for an unnecessary length of time on the street; (2) the discharge of the steam when the plaintiff was passing the engine. The question of the contributory negligence of the plaintiff was also urged by the defendant.

At the instance of the defendant the jury returned the following special findings, which are necessary to an understanding of some of the questions presented: "*Question 1.* Was the engine at the time of injury standing alone north of School street, detached from the flats? *Answer.* Yes. (2) Was the engine waiting idle until the flats should be unloaded? *A.* Yes. (2½) Was Brownell, the fireman, the only person on the engine at the time? *A.* Yes. (3) Was plaintiff driving the team as it approached the engine at the time of the injury? *A.* Yes. (4) Did plaintiff know, before the injury, that his team, or either of them, was afraid of the cars or engine? *A.* Don't know. (5) As plaintiff approached the engine, was his team, or either of the horses, frightened at the engine? *A.* Don't know.

(6) Was the action of the team, or either of the horses, as plaintiff approached the engine with the intent to pass, such as warned him that it was dangerous to make the attempt? A. Don't know. (7) What was the space left clear between the engine and sidewalk in which plaintiff could pass? A. Fifteen feet. (8) Was plaintiff negligent in making the attempt to drive his team past the engine and between it and the sidewalk? A. No. (9) Did plaintiff's act in driving his team towards and up to the engine and attempting to pass the same contribute to aid or help to bring about the injury? A. No. (10) Although the road may have been further, was there not a safer road that plaintiff could have taken to reach where he was going, than attempting to pass the engine? A. No. (11) Do you find that steam was discharged from the cylinders of the engine at the time of the injury by the act of the person on the engine? A. Yes. (12) Did the fireman, Brownell, know at the time that plaintiff was attempting to pass the engine, and did he see plaintiff approaching? A. Don't know. (13) Did the fireman, Brownell, see the plaintiff until the accident happened? A. Don't know. (14) Was the act of discharging the steam under and behind the plaintiff's team wilfully done? A. Don't know. (15) Was the act of discharging the steam under and behind plaintiff's team done with the purpose to frighten the plaintiff's horses? A. Don't know."

I. Appellant urges that the entire evidence tends to show that the proximate cause of the injury was the discharge of steam while the team was passing, and that any other evidence of negligence was immaterial, and hence that it was error to frame instructions for the jury based on such testimony; and the argument refers to the fourth and fifth instructions as objectionable in this respect. These instructions treat of what may be negligence on the part of the company in leaving its engine on such a street for an unreasonable length of time, and it is appellant's theory that, if the injury was caused by the discharge of the steam, it can

1. RAILROADS:
injury by
frightening
team: kinds
of negligence
to be consid-
ered.

Andrews v. The Mason City & Ft. D. Ry. Co.

make no difference how long the engine had been there, or, to use the language of the argument: "Suppose it was negligence, the fact that it stopped at the place of the accident and remained an unreasonable length of time was in no manner connected with the injury directly." A word in this respect should suffice. If the conceded negligence of remaining had not been, would the accident have occurred? Without that the act causing the injury could not have happened,—that is, it could not have happened at that place. It was evidently the noise at that place that caused the fright, and it was because of the engine being there when it should not have been. Conceding the negligence in delaying the engine, the accident seems to have been a direct result of it.

II. The next alleged error is that the court erred in admitting testimony as to the height of the track above the ground at or near the place of the injury. There is testimony directed to the question of whether it would not have been safer for plaintiff to have crossed over to the east side of the track. Such a question was put by appellant's counsel to plaintiff, and that seems to have been a legitimate inquiry as to the question of contributory negligence, and to that end it was proper to inquire as to the character and condition of the track he must cross. It was proper to consider all the surroundings in passing upon the question of plaintiff's negligence in driving where he did; as, could he prudently attempt to cross the track as it was, and with the engine and train there?

III. At the time of the accident the engineer in general charge of the engine had left it temporarily, and the fireman was alone with it; and there is considerable controversy as to the capacity in which he was there, or as to his duties, as he was the one who caused the discharge of steam that frightened the team. The sixth instruction said to the jury, in substance, that if the fireman was left by the engineer in temporary charge of the

2. —: —:
contributory
negligence:
evidence.

3. —: —:
fireman in
charge of
engine: evi-
dence:
instruction.

engine, and while so in charge, or while employed in the discharge of his duties as fireman, he negligently or wilfully let off steam and thereby frightened plaintiff's horses, and injured the plaintiff, the defendant was liable; and this is assigned as error on the ground of an absolute want of evidence to justify it. It is in evidence and unquestioned that the engineer left the engine on the street with the fireman, and told him to "watch her;" that he was gone some five minutes; and that the injury occurred during his absence. There is evidence, then, as to the fireman being there to watch the engine, and that while thus with it alone he let off the steam charged to have caused the injury. The court charged the jury in this instruction that if the fireman was not left in charge of the engine, or was not in the discharge of his duties as fireman, when the steam was let off, the company was not liable, and it leads to the question if the jury could legally find, from the evidence of his being left to watch the engine, that he was in charge. The engineer, it is true, says that he did not leave him "in charge," but to watch the engine. We do not think the jury was bound to accept this statement as conclusive. It is at best but his interpretation of what he meant by telling him to "watch her." It is not pretended that he said to the fireman more than the words quoted. What, then, would a jury be warranted in finding as the duties of a fireman left to watch an engine on the business street of a town during the temporary absence of the engineer? We think they were warranted in finding that it was his duty to take care of it, and to use his judgment in that respect. Although the word "charge" was not used, we think it cannot consistently be claimed that the fireman was not in temporary charge of the engine, and in such a manner that, as to third parties, the company was liable for his negligent acts. Such a rule, we think, is demanded by public policy. We think the testimony sufficient to justify the instruction given.

IV. Appellant asked the court to give the following instruction: "The fact that defendant negligently

 Andrews v. The Mason City & Ft. D. Ry. Co.

4. INSTRUCTIONS: allowed its engine to stand upon the street
 refusal to would not authorize the plaintiff to make
 give: no the attempt to pass if he knew, or had good
 prejudice. reason to believe, that such an attempt would be accom-
 panied with peril and danger." This the court refused,
 and gave the following: "You are instructed that it
 was the duty of plaintiff in approaching the engine to
 exercise that degree of care and prudence for his
 safety which an ordinarily prudent man would have
 exercised; and if you believe from the evidence that by
 the exercise of that degree of care and prudence he
 would have avoided the injury, you should find for the
 defendant." Without questioning the correctness of
 the instruction asked, that given by the court is equally
 correct, as a law proposition, and certainly is favorable
 to the appellant.

V. To the fourth, fifth and sixth questions sub-
 mitted to the jury it returned the answer, "Don't know,"

5. — : special and this fact is urged as a reason for setting
 interrogato- aside the verdict. The plaintiff was not
 ries: failure required to establish any of the particular
 to answer. facts suggested by the questions to entitle him to recover,
 and the most that can be said is that these facts were
 not established. A reference to them will show that an
 affirmative answer to any or all would tend to show
 negligence on the part of the plaintiff. A negative
 answer, or a failure to answer, could have no such
 tendency. A failure to answer is but indicative of
 insufficient proof to establish the fact, and facts are by
 no means to be assumed from a want of evidence for
 their support. Independent of these particular facts,
 diligence on the part of the plaintiff may have been
 found, and evidently was. They are not of those ulti-
 mate facts without which the verdict could not be
 sustained. If there are other facts upon which the ver-
 dict may rest, a failure to answer these questions will
 not justify reversal.

VI. At the close of the testimony the plaintiff was
 permitted to amend the petition to conform to the

6. PLEADING: amendment to conform to proofs. proofs, against the objections of the defendant. An examination of the pleadings shows that the only legal effect of the amendment is to so change the averments of the petition as to make the act of discharging the steam that of the "engineer or fireman," instead of the "engineer." The argument in this respect is upon the theory that there is no evidence to justify it. This point has already received sufficient notice, and the court did not err in allowing the amendment.

VII. Error is assigned as to the refusal by the court to give instructions asked by appellant. We do not think it necessary to consider them separately. They merely announce rules in support of appellant's theory as to the testimony, and as to which our views are expressed. We think there is testimony to sustain the verdict, and the judgment is

AFFIRMED.

THE STATE V. SIMPKINS *et al.*

77	676
79	467
77	676
87	575
77	676
d107	184
107	185
77	676
115	523
77	676
123	338
77	676
129	553

1. Appeal: POINTS WAIVED BY SUBSTITUTED PETITION. Where an answer was filed, and therewith a motion to dissolve an injunction, and a demurrer to the answer was overruled and the injunction dissolved, and plaintiff then filed an amended and substituted petition, which was held bad on demurrer, and plaintiff appealed, held that this court, on such appeal, could not consider whether the court erred in overruling the demurrer to the answer and in overruling the injunction,—these points having been waived by the filing of the substituted petition.
2. Injunction: IN AID OF QUO WARRANTO. In a civil action in the nature of *quo warranto* to test official rights, brought by the county attorney in the name of the state, a preliminary injunction should not be issued restraining the defendants from performing the functions of their office.
3. Pleading: EFFECT OF SUBSTITUTED PETITION. Where a substituted petition is filed, the original petition is so far out of the case that it cannot be considered upon a demurrer to the substituted petition.

The State v. Simpkins.

4. **Schools: INDEPENDENT DISTRICTS: NUMBER OF DIRECTORS TO BE ELECTED.** Independent school districts having a population of five hundred or more are entitled to six directors, — two to be elected each year; and those of a smaller population to three directors only, — one to be elected each year. (Code, secs. 1802, 1808.) *Held* that, where such a district has had six directors, and the requisite population to justify that number, but the population has been reduced so as to fall below five hundred, it is entitled to elect only one director each year.
5. ——— : ——— : **TOO MANY DIRECTORS: QUO WARRANTO: PARTIES.** Where two directors are elected in one year in an independent district having a population of less than five hundred, while the law provides for the election of one only, it cannot be said that either is legally elected, and an action of *quo warranto* will lie against them both as individuals to test their right to the office, without making the district, or its inhabitants or directors, parties thereto.

Appeal from Marshall District Court.—HON. S. M.
WEAVER, Judge.

FILED, MAY 24, 1889.

THIS is an action in the nature of a *quo warranto*, by which the right of the defendants to hold the office of directors of the independent school district of Le Grand, in Marshall county, is called in question. An injunction was issued, and served upon the defendants, by which they were temporarily restrained from performing the functions of the office. The defendants filed an answer and a motion to dissolve the injunction. The plaintiff demurred to the answer. The demurrer was overruled, and the motion to dissolve the injunction was sustained. These orders and rulings were made in April, 1888. Afterwards, and on the fifteenth day of August, 1888, the plaintiff filed an amended and substituted petition. A demurrer to this petition was sustained, and judgment was rendered against plaintiff for costs, and the state appeals.

W. W. Miller, County Attorney, and *Henderson & Hargrave*, for appellant.

Parker & Nichols, for appellees.

ROTHROCK, J.—I. The plaintiff assigns error upon the ruling of the court upon the demurrer to the answer,

1. **APPEAL:** and the order dissolving the injunction, and points waived by substituted petition. counsel have discussed these questions to some extent. We do not think it proper to consider these rulings. They were superseded by the amended and substituted petition. It is only necessary to say that the injunction was improvidently issued.

2. **INJUNCTION:** The action was commenced by the county in aid of quo warranto. attorney in the name of the state, and there was no ground for an injunction, there being no proper parties to execute an injunction bond. It is true that the names of certain persons were incorporated in the original petition or information as relators, but by consent of the parties their names were stricken out of the petition.

II. The only question properly presented upon this appeal is whether the court erred in sustaining the

3. **PLEADING:** demurrer to the amended and substituted petition; and here we may say that all that part of the demurrer which attacks the petition upon facts set forth in the original petition must be ignored. The original petition was as foreign to any proper investigation of the legal sufficiency of the substituted petition as if the plaintiff had dismissed the original petition, and commenced a new action. Where a substituted pleading is filed in an action, the original may possibly be used as evidence against the party by reason of contradictory statements, or the like, but, on a demurrer to the substituted pleading, the two pleadings cannot be considered.

With these remarks as preliminary, we come to a determination of the question whether the substituted

4. **SCHOOLS:** petition sets forth a cause of action. The independent district: number of directors to be elected. material facts set forth in the petition are as follows: The independent school district of Le Grand is composed of certain territory in Marshall county, excepting a small part of the district, which is in Tama county. It was originally organized as a district

The State v. Simpkins.

having less than five hundred inhabitants, Six persons were acting as directors of the district in March, 1887, and the terms of two of said directors expired in March, 1888. Prior to March, 1888, the question was raised as to whether there were five hundred inhabitants in the district. At the election in March, 1888, part of the electors voted for one director, and the remainder voted for three; two of whom they claim were required by law to be elected, and the third was to fill a vacancy claimed to have been caused by the resignation of one of the "hold-over" directors. The party which voted for these directors was the victor at the polls, and three directors were declared to be elected, and they entered upon the duties of the office. It is averred in the petition as a fact that in March, 1888, and ever since that time, the population of the district has been less than five hundred, and not more than four hundred and twenty-five, and that only one person should have been elected at said election, and that there was no resignation, and no vacancy to be filled.

It is provided by section 1802 of the Code that at the organization of independent school districts six directors shall be elected, two of whom shall hold the office until the first annual meeting thereafter, two until the second, and two until the third annual meeting, their respective terms of office to be determined by lot. But in districts having a population of less than five hundred there shall be three directors. Under this section of the law, a district of five hundred inhabitants or more is required to have six directors, and those of less than five hundred shall have three directors; and by section 1808 of the Code districts with the larger population are authorized to elect two directors each year thereafter, and all those having a population of less than five hundred shall elect one director each year. As we have said, it is averred in the substituted petition that the district was originally organized as a district with less than five hundred inhabitants. But it is also alleged that for the year ending in March, 1888, there were six directors, and it is not claimed that all of them were

not legally elected. This would imply that the population had increased so as to exceed five hundred. We then have this case: When the population of the district falls below five hundred, should the number of the directors be diminished accordingly? We think that under section 1808 of the Code, if the population be less than five hundred at the time of the election, two members should not be elected. Such seems to be the plain meaning of that section. There is no provision of the law for taking a census to ascertain the population of the district for the purpose of determining whether one or two directors should be elected. But, where the population is claimed to be less than that number, it is not at all difficult to ascertain that fact. It must be remembered that the averment of the petition that the population at the time of the election was less than five hundred is admitted by the demurrer. So far, then, as the present inquiry is concerned, we must regard that fact as conceded.

One ground of the demurrer was that the district, or the inhabitants thereof, or the directors, are not made parties to the action. This was not at all necessary. The action is a civil action, in the nature of a *quo warranto*, to test official rights. It is plainly authorized by chapter 6, title 20, Code; and, if the averments of the petition be true, the election was illegal, because two directors were elected when the election of but one was authorized by law; and, as they are both incumbents by the same right, it cannot be determined that one of them was lawfully elected, and the proceeding is properly directed against them as individuals. We think the demurrer to the substituted petition should have been overruled; and this disposition of the case renders it unnecessary to determine the motion to strike appellees' abstract from the files.

REVERSED.

Morgan v. Kline.

MORGAN V. KLINE.

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d107 681

Mortgage : SECURING SEVERAL NOTES : ASSIGNMENT OF PART : SEPARATE FORECLOSURES. Conceding the rule that the proceeds of mortgaged property sold under special execution to satisfy a mortgage debt made up of different notes should be applied to the payment of such notes in the order of their maturity, and that one sale of the mortgaged premises exhausts the lien of the mortgage ; it does not apply to cases modified by special circumstances. And it is *held* in this case that the mortgagee may, without the consent of the mortgagor, assign the notes last falling due, and, by agreement with the assignee, make the assigned notes the first lien. And where that is done, and the agreement is in writing duly acknowledged and recorded, and the mortgagor afterwards sells the land, and the mortgagee forecloses the mortgage as to the notes retained by him, and buys in the land for only enough to satisfy the judgment, and the grantee of the mortgagor redeems, he cannot, under a claim that the mortgage lien was exhausted upon such sale, prevent the assignee of the notes constituting the first lien under the agreement from foreclosing the mortgage as to such notes.

Appeal from Pottawattamie District Court.—HON.
H. E. DEEMER, Judge.

FILED, MAY 24, 1889.

ACTION in equity to recover the amount due on two promissory notes, and to foreclose a mortgage given to secure the same. There was a trial on the merits, and a judgment in favor of plaintiff as prayed. The defendant Kline appeals.

Flickinger Bros. and *L. W. Ross*, for appellant.

Cook & Dodge, for appellee.

ROBINSON, J.—On the eleventh day of April, 1883, Richard Keown made and delivered to J. J. Tomson four promissory notes, and to secure their payment executed and delivered a mortgage on the land in controversy. The first note was for five hundred dollars, and was payable March 1, 1885. The second was for a like amount, and was due one year later. The third and fourth notes were for eleven hundred dollars each, and were payable, respectively, on the first day of March,

Morgan v. Kline.

1887, and the first day of March, 1888. Each note contained a provision that, if the interest, which was payable annually, was not paid when due, the holder might elect to consider the principal due and collectible forthwith. On the eighteenth day of May, 1883, Tomson sold the two notes last described to plaintiff, together with an interest in the mortgage for their security, and executed a written assignment, which provides that the two notes so sold should be the first lien on the mortgaged premises, and that the remainder of the notes secured by the mortgage should be a second lien, subject to said first lien. Keown was not a party to that assignment, and, so far as it is shown, never assented to it. It was acknowledged and recorded the day after it was given. On the eleventh day of June, 1883, Keown and his wife sold the mortgaged premises to William Miller, subject to the Tomson mortgage, for thirty-two hundred dollars. On the twenty-second day of February, 1886, Miller, by quitclaim deed, conveyed the premises to Sarah Keown, the wife of Richard, and on the twelfth day of November, 1886, she and her husband executed a quitclaim deed for the same to appellant. These several conveyances were duly acknowledged and recorded. In the year 1885 Tomson brought an action to recover the amount due on the two five hundred-dollar notes, and to foreclose the mortgage. Richard and Sarah Keown, Miller, and others were made parties defendant. Plaintiff was also named as a party defendant, but was not brought into court. The petition in that case recited the assignment of the third and fourth notes to the plaintiff in this action, and the agreement by which they were to be paramount to the lien of the first and second notes, and recognized the claim of this plaintiff as superior to that of the plaintiff in that case. The petition also demanded judgment for the amount of the notes, and asked that a special execution issue for the sale of the mortgaged premises, subject to the rights of this plaintiff therein. Judgment was rendered on the ninth day of September, 1885, as prayed, no appearance having been made by defendants, and the claim of this

Morgan v. Kline.

plaintiff was found to be superior to that of the judgment. The premises were sold to Tomson by virtue of a special execution on the twelfth day of November, 1885, for an amount just sufficient to satisfy his judgment. In September, 1886, on the motion of the defendants Sarah Keown and William Miller, to which Tomson appeared, the judgment was amended by the addition thereto of the following: "Provided, that nothing in this decree contained, as to the agreement herein mentioned between the plaintiff J. J. Tomson, and the defendant J. B. Morgan, as to the priority of their liens as to each other, under the separate notes held by them under the mortgage herein on the premises aforesaid, shall be binding, or have any validity, force or effect as against the defendants William Miller and Sarah Keown, or either of them, their heirs or assigns, or in any way modify or effect their remedies or rights of redemption under the respective notes and liens held by them on the property in controversy." On the twelfth day of November, 1886, appellant redeemed the premises by paying to the clerk the full amount required for that purpose. This action was commenced on the second day of April, 1887, to recover the amount of the last two notes, and to foreclose the mortgage. The plaintiff asks that the interest of appellant be adjudged to be inferior to the claim of plaintiff. Judgment was rendered substantially as prayed.

I. The mortgage in question contains no provision in regard to the priority of the notes it was designed to secure, other than the recital as to the respective dates on which they became payable. It is insisted by appellant that by the rules announced in numerous decisions of this court the proceeds of mortgaged property sold under special execution to satisfy a mortgage debt made up of different notes should be applied to the payment of such notes in the order of their maturity, and that one sale of the mortgaged premises exhausts the lien of the mortgage. The rules may be conceded to be as claimed, excepting in cases modified by special circumstances. It is further contended by appellant that

Morgan v. Kline.

the agreement entered into between Tomson and plaintiff could not affect the priority of the notes as fixed by law, without the assent of the mortgagor. It may be admitted that it could not operate to the prejudice of the mortgagor without his consent. While it is true that, as between the parties to the mortgage, in the absence of a stipulation to the contrary, it would be held to secure the notes in the order of their maturity, beginning with the one which first fell due, yet it was given to secure all the notes. The mortgagee owned them and the mortgage absolutely, and had a right to sell such interest therein as he might elect. It was his privilege to sell the last two notes, and to relinquish all claim to the mortgage, or to make the claim he retained junior to that he sold. He adopted the latter plan, and executed an assignment which fixed the respective rights of the mortgagee and the plaintiff. It was duly acknowledged, and represented different interests in real estate, and the record thereof was constructive notice of the interests of the parties thereto. The grantees of Richard Keown acquired their interests with constructive notice of the rights of plaintiff. When Tomson foreclosed the mortgage, and the premises were sold to satisfy his judgment, and when appellant redeemed from the sale, the records showed that Tomson was in effect, at most, a junior lien-holder, without right to enforce a sale of the premises to the prejudice of plaintiff. What defense, if any, might have been interposed to Tomson's suit we are not required to determine. But the lien of plaintiff was superior to that of Tomson. His interests had not been adjudicated in any action to which he had been made a party. The assignment to him could not have been prejudicial to the mortgagor in a legal sense, for the notes were payable to the order of the mortgagee, and the mortgage was incident to the debt passing by the assignment of it. We find no error in the judgment. It is therefore

AFFIRMED.

ZIMMERMAN V. THE HOME INSURANCE COMPANY

Fire Insurance: BREACH OF POLICY BY ADDITIONAL INSURANCE:

NOTICE AND CONSENT: EVIDENCE. The defendant issued to plaintiff a policy of fire insurance for fifteen hundred dollars on a certain building, and the policy permitted other insurance to the extent of fifteen hundred dollars, and provided as follows: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, this policy shall be void;" also, "The managers of the company at Chicago are alone authorized to make any change or grant any privileges under this policy, and any indorsement or agreement varying the contract, made by any agent or sub-agent of the company, is void." On the policy were indorsed the words: "DUCAT and LYON, Managers, Chicago, Ill." At the time the policy was issued there were two other policies in force upon the building, one for fifteen hundred dollars, and the other for two thousand dollars of which the company's agent who transacted the business had notice; but it was the understanding that the two thousand dollars should be canceled, which, however, was never done. The fifteen-hundred-dollar policy expired a short time after the policy in question was issued, and plaintiff secured the same amount of insurance in another company. After doing this he notified the agent of defendant, through whom he had secured defendant's policy, of that fact, and said: "Shall I notify the companies, or will you?" This agent was also the agent for the company which carried the two-thousand-dollar risk. There was no evidence that plaintiff ever sought or secured, either through the local agent or the managers at Chicago, permission to carry more than fifteen hundred dollars additional insurance, and the property was burned before any additional premiums had been paid to defendant. In an action on the policy, *Held*—

- (1) That the failure or inability to get the two-thousand-dollar policy canceled according to the understanding did not operate as a permission from defendant to carry it in excess of the amount allowed by its policy, and that by carrying the excess the policy was rendered void.
- (2) That there was no evidence to be submitted to the jury on the question whether the defendant had consented to the excessive insurance, and that the court properly directed a verdict for defendant.

Appeal from Delaware District Court.—HON. D. J. LENEHAN, Judge.

FILED, MAY 27, 1889.

77	685
90	461
77	685
92	327
77	685
98	528
100	176
100	180
77	685
102	562
77	685
110	428
77	685
113	68
77	685
126	229
77	685
143	464

ACTION on a policy of insurance. There was a judgment for the defendant, and the plaintiff appeals.

J. H. Trewin and J. H. Shields, for appellant.

Cole, Mc Vey & Clark and Bronson, Carr & Le Roy, for appellee.

GRANGER, J.—On the twenty-second of December, 1886, the defendant company issued to the plaintiff its policy of insurance for fifteen hundred dollars on a certain building in Earlville. The building was, on the eleventh of May, 1887, totally destroyed by fire. The policy by its terms permitted fifteen hundred dollars of other insurance, and also provided that “if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * this policy shall be void.” At the time of applying for the policy in defendant’s company, the plaintiff held a policy in the Merchants & Bankers’ Company for two thousand dollars, and one in the Hecla Insurance Company, of Madison, Wisconsin, for fifteen hundred dollars. The policy in the Hecla Insurance Company would expire, by limitation, February 9, 1887, and that of the Merchants and Bankers’, November 24, 1891. At that time the plaintiff undertook to cancel the policy in the Merchants and Bankers’ Company, and for that purpose wrote across the policy the words, “Please cancel this policy,” signed it, and sent it to the company. Letters were also written to have the policy canceled. It was not, however, canceled, and the company continued to carry the risk. The last part of January, 1887, and before the expiration of the policy in the Hecla Insurance Company, the plaintiff took an additional policy of insurance for fifteen hundred dollars in the Council Bluffs Insurance Company.

I. The defendant company resists payment of the

Zimmerman v. The Home Ins. Co.

loss for the alleged reason that the taking of this additional insurance was a violation of the contract, and avoided the policy. The appellant's claim is that the additional insurance was with notice to the company, and with its consent. The business of appellant with the defendant company was done with and through one J. H. Fuller, at Earlville, both as to the original taking of the insurance and the consent for additional insurance, as claimed by appellant. On the face of the policy is the following provision: "The managers of the company at Chicago are alone authorized to make any change or grant any privileges under this policy, and any indorsement or agreement varying the contract made by any agent or sub-agent of the company is void." On the policy is indorsed the words: "DUOAT and LYON, Managers, Chicago, Illinois." At the close of the plaintiff's testimony the court, on motion of defendant, orally instructed the jury to return a verdict for it, which was done. Some further errors appear by assignments, but they are all embraced in the one query: Did the court err in this instruction to the jury? The theory of the appellant is that there was testimony on which the court should have submitted to the jury the question of whether or not the company had been notified of the additional insurance, and consented thereto.

The plaintiff was not a witness at the trial, and R. Zimmerman, her husband, seems to have done all the business for her, and was a witness, and it was this witness that gave the notice and obtained the consent to additional insurance, if it was obtained. The abstract of appellant shows the testimony of R. Zimmerman on this subject to be as follows: "I had a conversation with Mr. Fuller on or about the ninth or tenth of March, 1887. I said to him: 'Shall I notify the companies, or will you?' I have taken insurance in the Council Bluffs. The Merchants and Bankers' he knew all about long before. I notified him I had fifteen hundred dollars in the Council Bluffs and two thousand dollars in the Merchants and Bankers'. I have known Mr. Fuller

Zimmerman v. The Home Ins. Co.

about nineteen years. He is justice of the peace, and in the insurance business. He represents the New York Home and Merchants and Bankers'. He was agent for them when I dealt with him. Fuller had the agency for the Home for twelve or fifteen years. He did all the business with the policy-holders there for the Home Insurance Company. The policy sued on was obtained by me from Mr. Fuller. At the time I made application for the Home policy I had fifteen hundred dollars other insurance in the Hecla Insurance Company, and two thousand dollars in the Merchants and Bankers', and told Fuller all about both of them. *Cross-examination.* I went to Mr. Fuller's office about the ninth of March. John Young was there. I told Fuller about the Council Bluffs and the Merchants and Bankers' policy. I was going to drop the Merchants and Bankers', because I had to pay too much assessments. I had the Home, and told Mr. Fuller I got a policy in the Merchants and Bankers'. I had fifteen hundred dollars' insurance in the Hecla, also, when I got the Home policy, and Fuller knew all about them. At the time I got the Home policy, in December, I did not suppose the Merchants and Bankers' was canceled. It was never canceled. *Redirect.* I sent in the Merchants and Bankers' policy to be canceled about the fifteenth of December, and got a letter back in three or four days, that they would not cancel it; and I then, the same day, had a further talk with Mr. Fuller, and showed him a letter. The letter stated that they would not cancel unless I would pay short rates. Mr. Fuller then wrote a letter to the company for me, and said in it that I would pay the full year and not at short rates, and I sent them the year's premium. The company then sent the policy back. The Hecla policy expired on the ninth of February, 1887, and the Council Bluffs began on that day. The Merchants and Bankers' policy was never canceled. *Recross.* I received the letter from the Merchants and Bankers' in which they refused to cancel the policy before the twenty-second day of December, when the Home policy was made." At the

Zimmerman v. The Home Ins. Co.

time of this conversation, one Young was present, and his testimony in most respects corroborates that of Zimmerman. But take Zimmerman's testimony as in all respects uncontradicted, and what is its value? It is to be kept in mind that he is seeking to show an agreement or consent, under his contract of insurance, for additional insurance. Under the letter of his contract with the defendant, such consent must be from the managers at Chicago; and, if it should be conceded that the fact of the consent may be shown by parol, where is the testimony even tending to show it? It is not disputed but that the taking of the additional insurance would avoid the policy. The evidence, then, is that after the taking of the insurance Zimmerman went to Fuller, and said: "Shall I notify the company, or will you? I have taken insurance in the Council Bluffs'. He knew of the Merchants and Bankers' long before."

Now, we do not say that the condition of appellant would be better, but his claim would be far more plausible, if before taking the insurance he had notified the agent, and then, without objection, had taken it. But here he has done the act which avoids his policy, and then, by a mere notice, without asking consent, he seeks to show that consent was given merely because of knowledge of the breach. We do not think such a rule has ever been sanctioned by a court of last resort. We are referred to many cases in which it is held that the knowledge of the agent is the knowledge of the company. The facts as a basis for such a holding are that if the agent, when he takes the risk, knows of insurance, and the policy stipulates against it, the company is bound by this knowledge of the agent, and will not be permitted to receive a premium for insurance, and then avoid liability for the existence of a fact which it knew to exist when making the contract and receiving the premium. Such a rule is founded in sound public policy, and fraught with good results. But how different is this case. Here there is a contract against, not what actually exists, but against a future occurrence, except by its consent, and then the event sought to be

Zimmerman v. The Home Ins. Co.

avoided is forced upon it, in violation of the agreement, and their consent sought to be established merely by notice of the fact that the wrong has been done. In this case the appellant could not have been misled by the silence of the company, for his *status* was not changed in consequence of such silence. He was not in a position to act, relying upon this notice to defendant,—if, indeed, it was such a notice,—for his action preceded the notice. If the defendant had received money as premium after this notice, or had, by its silence or acts, in any manner induced a change in the affairs of appellant, the rule might be different. This much has been said upon the theory that notice of the additional insurance to the agent, Fuller, would be notice to the company. The contract of insurance gave notice to the appellant that the terms of the contract could only be changed by consent of the managers at Chicago. But it seems that Zimmerman did not think that notice to Fuller would be of avail, his purpose being to notify the company, as he asked which should do it. There is nothing to indicate that he sought consent or approval, for nothing of that kind is mentioned, nor is there a word of proof that he ever made inquiry as to the answer of the company, if he expected Fuller to notify it. Some importance is attached to the fact, by appellant, that, when Zimmerman asked of Fuller which should notify the company, he said, in substance, that it was all right,—he would attend to his own company. The language does not indicate in any sense a purpose to consent for the company, and there is no claim that the company ever returned a consent after notice. We think appellant entertains an erroneous view of the law as to the authority of an agent to change the conditions of a policy after the contract is completed. The distinction between the authority of a soliciting or local agent to bind the company at the time of making the contract, and changing it after it is made, is well defined by the decisions of courts. In the making of contracts the law, regardless of the purpose of the company, invests the agent with sufficient authority to contract on

Zimmerman v. The Home Ins. Co.

a basis of fairness to both parties, and, when a contract is thus made, the law should protect the parties in its faithful observance. This contract expressly provided how and with whom it could be modified. The case of *Hankins v. Insurance Co.*, 70 Wis. 1; 35 N. W. Rep. 34, is directly in point. It is of importance as to the right of appellant to continue excessive insurance merely because it was on the premises when the policy in question issued, and also as to the conditions of the policy as to how its provisions could be changed; and in that respect it is very similar to the case at bar. In that case there was an application to the local agent for permission to mortgage the premises, which permission would be a waiver of the conditions of the policy. The agent said: "It's all right. Go ahead, and make out the contract." The condition of the policy was that such a waiver could only be by the secretary of the company, in writing. It was held to be no waiver, and the encumbering of the property avoided the policy. The case cites a large number of authorities in support of the rule.

II. It is urged in argument that, at the time the policy issued, there was insurance on the property in excess of the limit under the policy. That is true; but at that time there was an effort to cancel the Merchants & Bankers' policy, which would have brought the amount within the requirements of the contract. The company, however, was bound to contract with reference to the facts as known at the time. It was then expected by both parties that the reduction would be made. Both parties then understood what the amount of insurance was expected to be, and the mere fact that it could not be reduced when it was intended to be would not make a contract that the excessive amount should be kept up by additional insurance. See *Hankins v. Insurance Co.*, *supra*. The wisdom of a limitation as to the amount of insurance on property is too manifest to deserve notice, and parties have the right to fix the limit by contract. When thus fixed, it should be observed. Insurance companies are held to a fair

Jenswold v. Doran.

construction of their contracts of insurance, and no unfair advantages are allowed to them. This is not a case of a complaint of unfairness, nor of advantages by virtue of superior skill or extended experience. The plaintiff knew well his contract, and, with such knowledge, violated it. We think there was no testimony to justify submitting to the jury the question of a consent, and that the judgment of the district court should be

AFFIRMED.

JENSWOLD V. DORAN.

THE SAME V. RUTLEDGE.

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125 532

1. **Tax Sale and Deed: PURCHASE OF PART OF TRACT FOR WHOLE TAX: FORM OF BID: VALIDITY.** Section 876 of the Code provides that when a "purchaser (at tax sale) shall designate the portion of any tract of land or town lot for which he will pay the whole amount of taxes assessed against such tract or lot, the portion thus designated shall, in all cases, be considered an undivided portion." In these cases it appears from the tax-sale record, which is the authoritative record of the sales, that the bids were made upon fractions of the tracts, as one-twentieth and one-eightieth. *Held* that the law would regard the sales as of undivided interests, and valid, though the list of lands advertised for sale showed that the bids were for "two acres" and "one-half acre." (*Brundige v. Maloney*, 52 Iowa, 218; *Poindexter v. Doolittle*, 54 Iowa, 52, distinguished.)
2. ——— : ——— : **ONE NOTICE TO REDEEM FROM TWO SALES.** A purchaser at tax sale purchased one fraction of a tract of land for the taxes of one year, and the other fraction, and the whole of another tract, for the taxes of the next year. His notice to redeem recited the two sales of the several fractions, and the purchase of all of the other tract by the same person, but it was single as to the purchaser and person in whose name the land was taxed. It was addressed to the proper person and was properly served. *Held* that it was not invalid because it covered more than one sale and certificate, and more than one tract. (*White v. Smith*, 68 Iowa, 813, and *Adams v. Burdick*, 68 Iowa, 666, distinguished.)

Appeals from Palo Alto District Court.—HON. GEORGE H. CARR, Judge.

FILED, MAY 27, 1889.

THESE cases present substantially the same questions, and they will be determined in one opinion. They involve the validity of certain tax deeds upon four forty-acre tracts of land in Palo Alto county. The plaintiff is the owner of the patent title, and the defendants are the owners of the tax titles. The district court held that the tax titles were valid, and the plaintiff appeals.

John Jenswold, Jr., pro se.

Soper & Allen, for appellee Doran.

P. O. Cassidy and D. Rutledge, for appellee Rutledge.

ROTHROCK, J.—I. The actions were originally commenced by the plaintiff, Jenswold, against other parties, for the purpose of quieting his patent title, and decrees were entered in his favor. The appellees herein intervened in the actions, and claimed the lands under certain tax deeds. Jenswold joined issue with appellants, and claimed that the tax deeds were void, and conveyed no title.

It appears from the record that on the fifth day of December, 1881, said John Doran became the purchaser at tax sale of a one hundred and sixtieth interest in one of the forty-acre tracts, and that in consideration of said purchase he paid the delinquent taxes on the whole tract. At the next annual tax sale, which was held in December, 1882, the remainder of the same forty-acre tract was delinquent for the taxes for 1881, and was offered for sale, and Doran bought the whole of the same, being one hundred and fifty-nine one hundred and sixtieths thereof, for the amount of taxes due thereon, and at the same sale he bought the whole of another of the forty-acre tracts in dispute for the delinquent taxes due thereon. It thus appears that at the two tax sales,

1. Tax sale and deed: purchase of part of tract for whole tax: form of bid: validity.

Jenswold v. Doran.

in the years 1881 and 1882, Doran became the purchaser of all of both the forty-acre tracts claimed by him. He paid the subsequent taxes, and within the proper time he gave notice of redemption to the proper party; and at the expiration of three years from the day of sale he surrendered his certificates of purchase to the county treasurer, and received treasurer's deeds for all of both tracts. Rutledge, the other appellee, bought the two other forty-acre tracts in substantially the same way. The only difference was that at the first sale he bought one-twentieth of one forty, and one eightieth of the other, and paid the delinquent taxes on the whole tracts; and at the second sale he became the purchaser of the remaining parts of each forty-acre tract claimed by him. It appears from the above facts as to the sale of the land for taxes that there must have been competition among the purchasers at the first sale. The lands purchased were but small fractions of the tracts offered. Section 876 of the Code is as follows: "The person who offers to pay the amount of taxes due on any parcel of land or town lot, for the smallest portion of the same, is to be considered the purchaser; and, when such purchaser shall designate the portion of any tract of land or town lot for which he will pay the whole amount of taxes assessed against any such tract or lot, the portion thus designated shall, in all cases, be considered an undivided portion. * * *"

Appellant insists that all of these sales were void because, as he claims, the purchasers did not designate by their bids that they offered to pay the taxes for a designated undivided fraction of the land. He claims that the "list" of lands advertised for sale for taxes shows that the bids were made, not upon fractional undivided interests, but for "two acres" and "one-half acre." But, conceding that the tax-sale list does show that acres and fractional parts of acres were bid instead of undivided fractions of the whole tract, the sales cannot, for that reason, be held to be void. The tax-sale record, which is the authoritative record of the sales, shows that the bids were made upon fractions of the

Jenswold v. Doran.

tracts as one-twentieth and one-eightieth. But it is claimed that it does not appear where these fractions were located in the several tracts. This was wholly unnecessary. The law regards them as undivided interests. The deeds follow the fractional descriptions, and we think the record shows valid sales. It is only necessary to give the most casual examination to the cases of *Brundige v. Maloney*, 52 Iowa, 218, and *Poindexter v. Doolittle*, 54 Iowa, 52, claimed by appellant to be authority for holding these sales invalid, to demonstrate that they are not applicable to the question now under consideration.

II. It is next claimed that the notices of expiration of redemption were insufficient to authorize the execution and delivery of the treasurer's deeds.

2. —: —;
 one notice to
 redeem from
 two sales.

The notices were addressed to the proper person, and there is no objection to the manner of service. But it is claimed that the notices cover more than one sale and certificate, and more than one tract, and that they are insufficient for these reasons. An examination of these notices discloses the fact that they recite the two sales of the two fractions, the purchase of all of the two forties by the same person, and the notice given to the party to whom the lands were taxed. The notices were single as to the purchaser, and the person in whose name the land was taxed. They are in no sense within the rule of the cases of *White v. Smith*, 68 Iowa, 313, and *Adams v. Burdick*, 68 Iowa, 666. We think the notices are in form in substantial compliance with the statute.

III. Lastly, it is claimed that sales in 1882 were void because the delinquent taxes for 1881 were not carried forward upon the tax books as required by section 845 of the Code. This objection to the sales does not appear to be sustained by the evidence.

AFFIRMED.

77	696
81	475

77	696
126	433

RIEGELMAN & Co. v. TODD *et al.*

1. **Appeal: AGREEMENT OF ATTORNEYS: EVIDENCE.** An alleged oral agreement on the part of counsel for appellees that the cause should be submitted to this court upon appellants' abstract, and that a transcript should be waived, cannot be established by the affidavits of appellants' attorneys. (See Code, sec. 213, par. 2.)
2. ——— : **EVIDENCE WANTING: MOTION FOR NEW TRIAL FILED TOO LATE.** Where appellee's abstract contradicts appellant's, and is itself denied, but appellant fails to file a transcript, appellee's abstract must be taken as true, and when it thus appears that appellant's abstract does not contain an abstract of all the evidence, and shows that the motion for a new trial was not filed within the time prescribed by section 2838 of the Code, and it is not claimed that the time was extended for filing it, all questions which depend upon the evidence, or upon the motion for a new trial, must be disregarded.
8. **Instructions: FRAUD IN CHATTEL MORTGAGES: EVIDENCE.** In an action by the mortgagees of chattels to recover them from an officer holding them under an attachment, it is not necessary for the defendant, in order to succeed, to prove both that the mortgages were without consideration, and that they were made to defraud the creditors of the mortgagor; and the instructions in this case (see opinion) do not, when considered together, as they should be, so hold.

Appeal from Carroll District Court.—HON. J. P. CONNER, Judge.

FILED, MAY 27, 1889.

ACTION to recover the possession of specific personal property, or the value thereof, if it cannot be found, and damages for its detention. There was a trial by jury, and a verdict and judgment for plaintiffs. The defendants appeal.

Cole, McVey & Clark and *Thos. F. Barber*, for appellants.

Lehman & Park and *E. M. Betzer*, for appellees.

ROBINSON, J.—Plaintiffs seek to recover a stock of millinery and ladies' furnishing goods and certain furniture, to which they claim title by virtue of two chattel mortgages executed by C. R. Meldon. One of the mortgages was given to plaintiffs, and the other to M. Meldon. Defendants are the sheriff of Carroll county and D. B. Fiske & Co. They claim a right to the goods under a writ of attachment issued in favor of said D. B. Fiske & Co., and against the property of C. R. Meldon, and allege that the mortgages by virtue of which plaintiffs claim title were executed to hinder, delay and cheat the creditors of the mortgagor, and that they are therefore fraudulent and void. The jury found specially that the mortgage to M. Meldon was void, and that the value of the stock, when taken by defendants, was fourteen hundred and fifty dollars, and that the total amount due the plaintiffs was \$1,536.68. Judgment was rendered for that amount.

I. The appellees, by an additional abstract, deny that the abstract of appellants is an abstract of all the evidence introduced on the trial, and show that the verdict was returned on the twenty-second day of December, 1887, and that the motion for a new trial was not filed until the twenty-eighth day of that month. Appellants deny the statements of the additional abstract, but failed to file a transcript in this court. Appellants have filed a motion to strike from the files the additional abstract, on the ground that it was verbally agreed between the attorneys of the respective parties that a transcript should be waived, and the cause submitted in this court on the abstract of appellants. Affidavits of attorneys for appellants are submitted in support of the motion. The alleged agreement is denied by appellees, and cannot be established in the manner proposed. Code, sec. 213 (2). The motion to strike will therefore be overruled. In the present condition of the record,

¹ **APPEAL:**
agreement of
attorneys:
evidence.

Riegelman & Co. v. Todd.

2. —: evi-
dence want-
ing: motion
for new trial
filed too late.

all questions which depend upon the evidence or upon the motion for a new trial must be disregarded. It is not claimed that there was any extension of time for filing that motion. Code, sec. 2838; *Stiles v. Estate of Botkin*, 30 Iowa, 60; *Patterson v. Jack*, 59 Iowa, 633.

II. The court charged the jury as follows: “(4) The defendant, to defeat the right of the plaintiffs to recover, claims that the mortgages were made without consideration, and to hinder, delay and defraud the creditors of C. R. Meldon the maker of the mortgages, and are therefore fraudulent and void. (5) And the question for you to determine is whether or not this defense is sustained by a preponderance of the evidence. If so, your verdict must be for the defendants.” It is claimed that these paragraphs of the charge are erroneous, in that they require defendants, in order to succeed, to prove that the mortgages were without consideration, and also that they were made to hinder, delay and defraud the creditors of the mortgagor. The fourth paragraph is not a correct statement of the law, and, if taken alone, would be not only erroneous, but presumptively prejudicial. It is evident, however, from a consideration of the charge as a whole, that it was not designed by the court to be more than a general statement of a claim made by defendants, and could not have been so understood by the jury. The sixth paragraph of the charge was as follows: “If you find from the evidence that C. R. Meldon made either one of said mortgages without a valuable consideration therefor, then such mortgage is void as to D. B. Fiske & Co., although the parties to the mortgage may not have actually had a fraudulent purpose in making it; and, if neither of said mortgages was supported by such consideration, then your verdict must be for the defendant.” In other paragraphs the jury were fully instructed as to the fraud which would avoid a conveyance of property as to creditors, even though it was supported by a valuable consideration.

3. INSTRUCTIONS:
fraud in chat-
tel mortgages:
evidence.

 Stickney v. Stickney.

Under the charge as a whole, the jury could not have been misled by the fourth and fifth paragraphs.

III. Complaint is made of the refusal of the court to submit certain special interrogatories and certain instructions asked by defendants, but in the absence of the evidence we cannot review the action of the court as to the matters specified. The record discloses no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STICKNEY *et al.* v. STICKNEY *et al.*

1. **Interest: PAYMENT DELAYED BY LITIGATION.** The payment of plaintiffs' mortgages was delayed by defendant's resistance. They provided for interest. *Held* that interest at the stipulated rate was properly allowed pending the litigation.
2. **Landlord and Tenant: TITLE TO PROPERTY ON FARM.** Where a tenant leases a farm and is to pay as rent one-half of all the products and stock raised thereon, he has a half interest in such products and stock, and it cannot be taken to satisfy the landlord's debts.
3. **Attachment: SERVICE BY OFFICER DE FACTO.** The service of an attachment by an officer *de facto* is valid as to the rights of other persons.

Appeal from Benton District Court.—HON. L. G. KINNE, Judge.

FILED, MAY 27, 1889.

ACTION in chancery to foreclose chattel mortgages. A decree was entered foreclosing the mortgages, and providing for the order of priority thereof. Defendant Lauderbaugh, whose mortgage is held to be last in the order of priority, appeals.

Gilchrist & Haines, for appellant.

Nichols & Burnham, for appellees.

77	699
98	14
77	699
1112	41

BECK, J.—I. The plaintiffs in this action seek to foreclose two chattel mortgages, executed by defendant Walter Stickney, to indemnify plaintiffs against their liability as sureties for him. The mortgages are upon the same property, viz., live-stock, grain and hay on certain specified farms in Benton county, owned by the mortgagor. The mortgagor subsequently executed to plaintiffs another chattel mortgage upon the same property, to secure an indebtedness arising for money loaned, the amount being ascertained by an accounting afterwards had. Prior to the execution of these mortgages, Snock had brought suit against Walter Stickney, and seized, upon an attachment issued in the case, a part of the live-stock,—thirteen three-year old steers. Judgment in this case was entered after the mortgages above mentioned had been executed. It has been assigned to plaintiffs' mortgagor. The mortgagor being insolvent, plaintiffs took possession of the property under their mortgages, and caused it to be advertised for sale. Defendant Lauderbaugh, in his answer, alleges that the several mortgages of plaintiffs were executed for the purpose of hindering and delaying himself and other creditors of Walter Stickney; that the indebtedness secured by the mortgages has been paid by the proceeds of sales of mortgaged property; that he brought suit on certain promissory notes executed by Walter, and recovered judgment thereon. An attachment was issued in the action after the plaintiffs' mortgages were executed and levied upon the property described in the mortgages, and plaintiffs were at the same time garnished. On the same day, but after the levy of the attachment, Walter executed to the defendant a chattel mortgage upon the property attached. Defendant's answer is made a cross-bill, and he prays for a foreclosure and judgment which shall be prior to the claims of all other parties. It appears from the pleadings that See, a tenant of Walter, claims an interest in the property covered by the mortgages as a part owner. This interest is admitted by plaintiffs, and is denied by defendant Lauderbaugh. Two

Stickney v. Stickney.

successive agreements were entered into by all the parties, to the effect that the plaintiffs sell the property and hold the proceeds to be disposed of as the court may direct, the money realized therefor to stand in the place of the property.

II. Defendant Lauderbaugh insists that plaintiffs' mortgages should not be enforced, for the reason that they were given to defraud Walter Stickney's creditors. The evidence clearly shows that the first two were given to secure plaintiffs, who became sureties for Walter for *bona-fide* debts. The third mortgage was executed for a sum greater than was really due, for the reason that the parties had made no settlement of the particular transactions out of which the indebtedness arose. We think that the district court's conclusions as to the good faith of the mortgages and the amount due thereon are correct.

III. The defendant thinks the court erred in allowing interest on these mortgages. All of them provided for interest, and we know of no reason why the decree should not allow it. Surely, defendant ought not to be heard to complain. By his resistance to plaintiffs' claim he has delayed their payment. The plaintiffs ask for nothing, as to interest, which is not provided for in the mortgages.

IV. Defendant insists that See had no interest in the property attached, and therefore the judgment in his favor is not warranted by the facts. We think differently. See leased a farm of Walter Stickney, and was to pay one-half of all the products, including all crops and fruits grown on the farm, and all hogs, cattle and calves raised on it. Of course, one-half was the landlord's, and one-half the tenant's. It would indeed be a harsh rule which would deny him an interest in the property, and make it all subject to the landlord's debts. No such rule exists.

V. Counsel insist that the levy of the attachment in the Snock case did not bind the property, for the reason that it was all owned by Walter, and the sheriff

Walker v. Abbey.

treated it as property in which See had an interest under the lease. But, if counsel's views as to the law on this point should be correct in case Walter did own the whole of the property,—which we are not prepared to adopt,—the fact upon which these views are based, namely, that Walter owned all interest in the property, is not established by the record. See surely had an interest in the property under his lease.

VI. Counsel argue that, as the officer to whom the attachment was delivered by the clerk for service, and who served it as a "special deputy," was not such an officer, or an officer at all, under lawful appointment, his acts were void.

8. ATTACHMENT :
service by
officer
de facto.

We think the record fails to show that he was not a duly appointed deputy. But, if he was not, he did hold the writ, and he did seize the property, and make return of his doings as an officer. He was an officer *de facto*, if not *de jure*. It would surely be a harsh rule which would defeat litigants, and overthrow liens, on the ground that one serving writs did not in fact lawfully hold the office of deputy, or was not appointed to serve the writ. The rights of litigants, relying upon the acts of executive officers, are better protected. The person having color of right to the office of deputy-sheriff, to whom a writ is delivered by the clerk of the court issuing it, and who makes service and return thereof, though he be not an officer *de jure*, is recognized by the law as an officer *de facto*, and his acts are valid as to the rights of other persons. The foregoing views dispose of all questions in the case. The judgment of the district court is

AFFIRMED.

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135 283

WALKER V. ABBEY *et al.*

1. **Vendor and Vendee: DEFECTIVE CONVEYANCE: NOTICE: BAD FAITH.** Where land is conveyed with an acknowledgment which is not good in this state, subsequent purchasers and mortgagees, claiming under a second deed from the same grantor who have actual notice of the prior conveyance, and who part with no value in acquiring their pretended title and interest, take nothing as against those claiming under the first deed.

Walker v. Abbey.

2. **Depositions: NOTICE OF TAKING: SERVICE.** A notice of the taking of depositions was addressed to certain attorneys as attorneys for the adverse parties A. and W., and they were in fact the attorneys for both A. and W., but they signed their names to an acceptance of service of the notice as attorneys for W. *Held* that the acceptance was good as against A., in the absence of any objection or claim that they did not appear in the case for A.

Appeal from Kossuth District Court.—HON. GEORGE H. CARR, Judge.

FILED, MAY 27, 1889.

ACTION in chancery to foreclose a mortgage executed by defendant Abbey and wife. Goldthwaite and Humphrey Anthoney intervene, claiming title to the lands mortgaged superior to plaintiff's mortgage. A decree was entered declaring plaintiff's claim fraudulent and void, and that the title of the land is in the intervenors. The plaintiff and defendants appeal.

Reed & Reed, for appellant Walker.

H. E. Long, for appellant Abbey.

Clark & Call, for appellee.

BECK, J.—I. The plaintiff seeks in this action to foreclose a mortgage upon a quarter section of land, executed to him by Abbey and wife to secure a promissory note for one hundred and twenty-five dollars and the interest due thereon. Hawkins and Miller are made defendants. The intervenors allege that they are the absolute owners of the land by conveyances under Walden, the patentee; that Hawkins procured a deed to be made by Walden to Miller by falsely and fraudulently representing to him that Miller was the holder of the title under Walden, and it was necessary to have a conveyance to perfect the title in him; that Miller conveyed the land to Abbey, who executed the mortgage in suit, and another mortgage to defendant Hawkins. It is alleged that these conveyances were executed in

Walker v. Abbey.

pursuance of a conspiracy of the plaintiff, Abbey, Miller and Hawkins to acquire a fraudulent title, and enforce it against the intervenors.

II. We find the facts to be as follows: The land was entered by Walden. He conveyed it to Latham and another, under whom the intervenors claim title. The deeds executed by Walden were not acknowledged in the form prescribed by the statutes of this state. Being executed in Massachusetts, they followed a form of acknowledgment in accord with the law of that state. Hawkins applied by letter to Walden, representing that "a party" whom he represented owned the land, and desired a quitclaim deed to cure a defect in the chain of title. Walden executed a deed, pursuant to this request, to Miller. Nothing was paid. Neither Miller, Hawkins nor any other person except the intervenors had any title to the land, or equity therein. These were facts known of course to Hawkins and Miller. Miller conveyed the land to Abbey, who executed a mortgage on it to Walker, as he alleges, to secure a prior debt for rent and money loaned. Abbey executed a mortgage on the land to Hawkins. The consideration paid by Abbey to Miller was certain stock in a coal-mining corporation, which is clearly shown not to have been of the value of one cent, and this was so known to the parties at the time. The alleged debt for which Abbey executed the mortgage to Hawkins is stated by Abbey in the following language: "I turned over a note of five hundred dollars on the payment of the horse I purchased of Mr. Hawkins, and he had trouble and a suit in collecting the note. I gave him this mortgage to indemnify him on that note." That Hawkins and Miller had full notice of the fact that Walden had conveyed the land, and that the title under him was claimed and held by the intervenor, there can be no doubt. And we think the facts lead to the conclusion that Abbey and Walker are chargeable with knowledge of the same facts. Abbey paid nothing for the land. This fact alone defeats his claim that he is a good-faith purchaser. The mortgage

1. VENDOR and
vendee: de-
fective con-
veyance: no-
tice: bad faith.

Walker v. Abbey.

to Walker is to secure a prior debt. He cannot therefore be protected as a purchaser in good faith. *Flannigan v. Althouse*, 56 Iowa, 513; *Phelps v. Fockler*, 61 Iowa, 340. The evidence irresistibly leads us to the conclusion that Hawkins, Miller, Abbey and Walker were all fully advised of the conveyance by Walden and the claim of the intervenors under it; that they acted in concert upon this knowledge, to acquire title to the property.

III. We need not consider certain objections to evidence tending to show that the acknowledgments of the deeds made by Walden were in accord with the law of Massachusetts, as we find from the evidence that all the parties had actual notice of the conveyance under which the intervenors claim the land.

IV. Certain depositions were taken on the behalf of the intervenors, and against the objections of the other parties were permitted to be read in evidence. The objections are based upon the alleged fact that no notice of the taking thereof was served upon Abbey. Code, section 3732, provides that a notice for taking depositions, or for issuing a commission to take depositions, may be served upon the attorney of record of the adverse party. In the case before us the notice was served upon an attorney who the record shows was at the time the attorney of Abbey. The service is shown by the written acceptance of the attorney who appeared for Abbey as well as for Walker. It is true, the attorneys affix to their signature to the acceptance of the notice words indicating that they are attorneys for Walker, but the notice is addressed to them as attorneys for both Walker and Abbey. They were in fact Abbey's attorneys, and in accepting the notice addressed to them as such they would be presumed to do so in that capacity, in the absence of any objection or disclaimer that they did not appear in the case for Abbey.

V. We need not inquire whether under the curative act of the twentieth general assembly, legalizing conveyances (chapter 203), the registry of the deeds

executed by Walden to the grantee, under whom the intervenors claim, imparted notice to any of the defendants, for the reason that we have reached the conclusion that the evidence shows that all are chargeable with actual notice of the conveyance.

The foregoing discussion disposes of all questions in the case. We are of the opinion that the decree of the district court ought to be **AFFIRMED.**

THE NATIONAL LUMBER COMPANY V. BOWMAN.

1. **Mechanic's Lien: COLLATERAL SECURITY TO DEFEAT.** In an action by a material man against a landlord and tenant to establish and enforce a mechanic's lien upon improvements placed on the premises by the tenant, the fact that plaintiff sought to establish that the landlord was a purchaser of the materials, and to make him personally liable, did not defeat the right to a lien, under section 2129 of the Code, providing that one cannot have a lien who has collateral security on the contract,—where the claim of personal liability was before trial dismissed without prejudice.
2. ——— : **ERROR IN DESCRIBING PREMISES: ACTUAL NOTICE.** In such action, an error in describing the premises, in the claim filed for the lien, did not defeat the right to the lien as against the landlord, where he had actual notice of all the facts, and could not have been misled by the error, but must have known that the lien was claimed on these very improvements.
3. ——— : **LANDLORD'S AND MECHANIC'S LIENS: CHATTEL MORTGAGE: PRIORITY.** A mechanic's lien for materials, on improvements made by a tenant on leased land in accordance with the terms of the lease, and with knowledge of the landlord, is superior to the landlord's lien for rent, and also to a chattel mortgage on the improvements taken by the landlord after they were made, but prior to the proceedings to establish the lien. (See opinion for statutes and cases cited.)

Appeal from Fremont District Court.—HON. A. B. THORNELL, Judge.

FILED, MAY 27, 1889.

THIS is an action for the foreclosure of a mechanic's lien, and the following agreed statement is taken from the abstract:

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101	107
77	706
105	5

“It is admitted that at all times herein referred to the plaintiff [defendant Bowman?] was the owner of the premises described in petition. It is admitted that on the first day of March, 1885, defendant Bowman leased said premises to defendant Givens, for the term of four years from March 1, 1885, at the annual rental of nine hundred and thirty dollars for first year, due December 1, 1885; nine hundred dollars for second year, due December 1, 1886; eight hundred and forty dollars for third year, due December 1, 1887; seven hundred and ninety-five dollars for fourth year, due December 1, 1888. That said lease was in writing, and introduced in evidence, and provides that the landlord shall have a lien on all crops raised, and on all other property of tenant brought on the demised premises, whether exempt from execution and attachment or not. It further provides that said tenant shall have the right to erect such improvements thereon as he may deem proper, and at the termination of the lease the landlord shall have the option of buying such improvements at their appraised value. It is admitted that said lease terminated March 1, 1889. It is admitted that defendant Givens, while in possession of said premises under said lease, erected certain improvements thereon, consisting of one corn-crib, one wind-mill and tower, one set of scales, one hog-house, ten feed-boxes, for which plaintiff sold and delivered to said Givens lumber and material amounting to four hundred and forty dollars, of which \$134.76 has been paid, leaving a balance of \$305.24, for which plaintiff obtained judgment by default against defendant Givens. That said lumber and material were sold and delivered on account from October 27 to December 10, 1885, in pursuance of a verbal contract therefor. It is further admitted, and the proof shows, that on January 16, 1886, plaintiff duly filed with the clerk of Fremont county district court a sworn statement of said account and claim for mechanic's lien on the improvements of defendant, which are described as situated on section 29, instead of section 23, on which the improvements referred to are situated; but otherwise it is admitted

that said lien, as filed, was sufficient, and in due form of law. It is admitted that plaintiff at all times claimed, and Bowman denied, a personal liability for the purchase of said lumber; and that on the trial of this cause plaintiff dismissed his claim against defendant Bowman for personal liability without prejudice to a future action." It is also an undisputed fact that defendant Bowman was present when the improvements were made on the premises, and knew of the lumber being procured for the purpose. Defendant Bowman alone made defense. There was a judgment for plaintiff, and defendant Bowman appeals.

W. P. Ferguson, for appellant.

James McCabe, for appellee.

GRANGER, J.—It will be observed that the contract by which Givens held the premises provided "that said tenant shall have the right to erect such improvements thereon as he may deem proper, and at the termination of the lease the landlord shall have the right to buy such improvements at their appraised value." There is no dispute but that the lien would attach as against Givens. The inquiries in the case are as to defendant Bowman's rights in the improvements, and we notice the different arguments in the order presented.

I. It is urged that plaintiff cannot avail itself of the lien claimed, because it has taken security which, under Code, section 2129, would defeat the lien. That section, in substance, is that a party shall not be entitled to the benefit of such a lien who has collateral security on the contract. The security referred to in this case is that of Bowman himself. In the suit plaintiff sought to establish that Bowman was a purchaser of the lumber, and make him personally liable, which fact Bowman denied, and before the final submission of the cause that claim was dismissed as to him without prejudice. The fact of

1. MECHANIC'S
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The National Lumber Co. v. Bowman.

security or personal liability is not admitted or established in the case. The argument, without the fact to sustain it, is entirely without utility.

II. The agreed statement shows that in filing the statement for mechanic's lien the section of land was by mistake inserted as "twenty-nine" instead of "twenty-three," and it is insisted that it amounted to no statement of a lien as to the premises in question. The filing of a statement was not necessary to charge defendant Givens. He had full notice without, and the admitted facts and testimony show that defendant Bowman had as much knowledge of the material facts as Givens. Bowman had constructive knowledge of the claim as filed. He knew Givens to be his tenant, and making the improvement on his premises, and must have known of the error, and that plaintiff claimed the lien on these particular improvements. An admission in the case is that plaintiff at all times claimed a personal liability against Bowman for the lumber, which was denied. *Noel v. Temple*, 12 Iowa, 276; *Kidd v. Wilson*, 23 Iowa, 464; Code, sec. 2133.

III. The lien, as established by the district court, attaches only to certain improvements, and not to the land. Appellant claims that his landlord's lien is prior thereto, and also that his chattel mortgage on the improvements, made subsequent to the improvements, but before the commencement of this proceeding, must take priority. We think subdivision 4 of section 2135 of the Revised Code is conclusive of the question. It in terms provides that for things furnished or work done, including those for repairs, additions and betterments, the lien shall attach to the buildings, erections or improvements for which they were furnished or done, in preference to any prior lien, or encumbrance, or mortgage on the land, which seems to contemplate that, as to improvements created by the materials or labor, the lien thereon shall be prior to all others. Section 2133 in terms provides that a failure to file the statement

2. —: error in describing premises: actual notice.

3. —: landlord's and mechanic's liens: chattel mortgage: priority.

Babcock v. Bonebrake.

within the time prescribed shall not defeat the lien, except as to purchasers and encumbrancers without notice. In this case Bowman had notice, which must be conclusive both as to the landlord's lien created by lease, and the mortgage afterwards given. This view finds support in the case of *Nordyke & Marmon Co. v. Woolen-Mills Co.*, 53 Iowa, 521. We find no error in the proceeding of the district court, and its judgment is **AFFIRMED.**

77	710
691	350

BABCOCK *et al* v. BONEBRAKE *et al*.

1. **Tax Sale: DELINQUENT TAX NOT BROUGHT FORWARD: WHEN NOT REQUIRED.** Under section 845 of the Code, a sale of land for taxes of a prior year is invalid if the delinquent tax is not entered by the treasurer on the tax book of the year in which the sale is made. But the rule does not apply to a case where the treasurer has not, at the time of making the sale, received the tax books from the auditor for the year of the sale. And in this case, where the treasurer received the tax books on the day of the sale, but it is not shown that he received them before the sale had been made, and it appears that the books for some of the townships were in the auditor's hands after the sale had closed, *held* (in view of the presumption which must be indulged that an officer has done his duty) that the tax sale could not be regarded as invalid for the failure of the treasurer to comply with the statute in this respect.
2. ——— : **NOTICE TO REDEEM: AMENDED PROOF OF SERVICE: WHEN AND BY WHOM MADE.** Where the purchaser of land at tax sale gave due and timely notice to redeem, but the proof thereof which he filed in the treasurer's office was defective, but he received a treasurer's deed for the land, and afterwards quitclaimed it, and it passed through several parties to W., it having in the meantime been improved and occupied by the grantees of the purchaser, but the purchaser never at any time assigned the certificate of purchase, *held* that, under section 894 of the Code, he was the proper person, though he had conveyed the land, to file proper proof of the service of the notice to redeem, which had been originally given, and to receive a new treasurer's deed for the land. Especially is it so held where W. and all the grantors in her chain of title, including the tax purchaser, join in asking that their tax title be confirmed as against the claimant under the patent title. (Compare *Rice v. Bates*, 68 Iowa, 393.)

Babcock v. Bonebrake.

8. ——— : ——— : IMPERFECT PROOF OF SERVICE : DEFECT CURED : PRIOR OCCUPANCY UNDER INVALID DEED : RENTS AND PROFITS : EQUITIES. Where there was due and timely notice to redeem from a tax sale, but imperfect proof of the service of such notice, but a deed was made to the purchaser, and his grantees took possession and cultivated and improved the land for some years, and meanwhile legal proof of the service of the notice was filed, and no redemption was made within ninety days thereafter, and a new deed was made by the treasurer upon such proof, and, only a few weeks prior to the time when the tax title would have been perfected by the statute of limitations, plaintiffs brought this action to redeem, *held* that their right was cut off by their failure to redeem under the second proof of service (*Long v. Smith*, 62 Iowa, 881), and that they could not claim that redemption had before that been made in equity by the rents and profits of the land which had been enjoyed by the holders under the tax title—the rental value of the premises having been created almost wholly by the improvements which they had made.

Appeal from Carroll District Court. — HON. J. P. CONNER, Judge.

FILED, MAY 27, 1889.

ACTION in equity to set aside certain tax deeds for the land described in the petition, to establish in plaintiffs a right to redeem from tax sales, and for other relief. The petition of plaintiffs was dismissed by the district court, after a hearing on the merits, and plaintiffs appeal.

J. W. Bull and *H. S. Fisher*, for appellants.

Geo. W. Paine and *O. H. Manning*, for appellees.

ROBINSON, J. —The land in controversy was sold on the fourth day of November, 1878, to P. J. Bonebrake, for the delinquent taxes of 1877. No redemption from the tax sales having been made, tax deeds for the land were issued to Bonebrake on the sixteenth day of December, 1881, and were recorded on the following day. Notice of the expiration of the time of redemption was duly given, but no sufficient proof of such notice was filed in the treasurer's office, although proof admitted by the parties to be defective was in fact filed after the expiration of two years and nine months from the time of

Babcock v. Bonebrake.

the sales, and more than ninety days before the deeds were executed. Prior to May, 1882, the land was uncultivated prairie land, and not occupied by, nor in the actual possession of, any one. After the tax deeds were recorded, Bonebrake executed to O. H. Manning a quit-claim deed for the land. In May, 1882, Manning conveyed the land to Nelson Seyller, who took actual possession of it, and broke during that season one hundred and eighty-five acres, and in the following December conveyed the land to R. P. Wilson. The land was cultivated by Wilson during the years 1883, 1884 and 1885, and during the two years first named he made improvements thereon of the value of eighteen hundred and forty-five dollars. In December, 1885, he conveyed the land to Maggie E. Wilson, who is still in possession of it, under claim of ownership. On the tenth day of February, 1885, Manning, as the agent of Bonebrake, made and filed, in the proper treasurer's office, affidavits showing due service of notice of the expiration of the time for redemption, given in August, 1881. On the twenty-second day of December, 1887, and more than a year after the commencement of this action, new treasurer's deeds were issued to Bonebrake on the sale of 1878. Plaintiffs are the owners of the land, unless their title was extinguished by virtue of the tax sales and the proceedings thereunder.

I. It appears that the tax book for the year 1878 was received by the treasurer of Carroll county on the day of the sale in question, and that it did not show that the tax of 1877 was delinquent when the sale was made. It is not shown that the tax book was in the hands of the treasurer when the land was sold. Section 845 of the Code required him to enter in the tax book, in the place and manner pointed out, the year for which the taxes on any tract of land are then delinquent. We must presume, until the contrary appears, that the treasurer discharged his duty in this case, and that the tax book was not in his possession when the sale was made. There was proof, also, which tended to

1. Tax sale: delinquent tax not brought forward: when not required.

Babcock v. Bonebrake.

show that the tax book for at least one township was in the hands of the auditor after the tax sale closed. If the tax book was in different parts, it is probable that all were delivered to the treasurer at the same time. The burden is on appellants to establish the alleged error, and they have failed to do so.

II. It is contended by appellants that the first tax deeds did not confer any right to take possession of the premises in controversy, nor bar their right of redemption; that the conveyance by Bonebrake to Manning divested the former of all interest in the premises, and terminated his right to file the second proof of service; that competent proof of service of notice of the expiration of the right of redemption has never been filed; and therefore that their right of redemption has not yet expired. It is admitted that neither the tax-sale certificate, nor the records of the treasurer's office, show that any assignment of the certificates has been made. Bonebrake had "conveyed, confirmed and quitclaimed" the land before the second proof was filed, but he had made no formal assignment of the certificates of tax sale. Under these circumstances, we think, he was authorized to make the proof in question. If he was then the rightful holder of the certificates, he was authorized by statute to make the proof. Code, sec. 894. If he was not such holder, it was competent for his grantees to authorize him to make the proof, or to ratify his act in making it, since it was for their benefit. The vital matter was the service of notice, and the proof of such service was in its nature formal. The case of *Rice v. Bates*, 68 Iowa, 393, held that under similar circumstances the tax-sale purchaser was the holder of the certificates, and as such authorized to make the proof, but we do not base our conclusions on that case. The record shows that Maggie E. Wilson is the present owner of all title and interests conveyed by the tax sales and tax deeds, and of the improvements made on the premises since the first deeds were given, and that

2. —: notice to redeem: amended proof of service: when and by whom made.

Babcock v. Bonebrake.

all the grantors in her chain of title, including Bonebrake, ask, in effect, that her title be confirmed. We are of the opinion that, under the circumstances of this case, the second service must be deemed sufficient.

III. The rental value of the premises from the time Seyller took possession to the expiration of the ninety days following the filing of the sec-

8. —: —:
imperfect
proof of
service: de-
fect cured:
prior occu-
pancy under
invalid deed:
rents and
profits: equi-
ties.

ond proof was more than the amount required to redeem from the tax sales. It is claimed by appellants that the possession and use of the premises by defendants operated as an equitable redemption from the tax sales. It is true that the title under which possession of the premises was taken was defective, but the defect was a matter of form, and not of substance. Due notice of the taking of the tax deeds had been given in fact, and, had there been a delay of less than three weeks in commencing this action, the title of the defendants would have been perfected by the bar of the statute. *Trulock v. Bentley*, 67 Iowa, 602; *Rice v. Haddock*, 70 Iowa, 319. The rental value in question seems to have been created almost wholly by their improvements. They occupied and improved the land in good faith, by virtue of tax deeds which were in due form, issued under a valid sale, and after due notice had been given. It is clear that the equities of the case are with appellees. The right of appellants to redeem expired ninety days after the filing of the second proof, and their interests in the premises were then terminated. *Long v. Smith*, 62 Iowa, 331, and cases therein cited. The defendant Maggie E. Wilson was in possession of the premises when this action was commenced. The title of her grantor was perfected as against appellants by their failure to redeem the land within the statutory period after the filing of the last proof of service, and she holds all the title he had acquired. For the purpose of this case it is not material to determine the necessity or effect of the second deeds. The appellants have failed to show themselves entitled to any relief. The judgment of the district court is therefore

AFFIRMED.

MALLORY *et al.* v. CITY OF MARION WATER WORKS
COMPANY *et al.*

77	715
108	573

Mechanic's Lien: MATERIALS TO CONTRACTOR: CONTRACTOR PAID BY OWNER IN ADVANCE. Where a contractor receives payment in full before the agreement with a subcontractor for materials is made, the subcontractor cannot have a lien as against the owner or his property. (See *Stewart v. Wright*, 52 Iowa, 377; *Roland v. Railway Co.*, 61 Iowa, 380.) In this case it was claimed that the contractor was in fact the company for which the work was done, and that, therefore, the company and its property should be charged with the lien; but the evidence (see opinion) does not support the claim.

Appeal from Linn District Court. — HON. J. H. PRESTON, JUDGE.

FILED, MAY 28, 1889.

ACTION in equity to foreclose a mechanic's lien. After a hearing on the merits the relief demanded against the City of Marion Water-Works Company was refused, and the plaintiffs appeal.

Davis & Voris, for appellants.

Thompson & Lanning, for appellees.

ROBINSON, J.—Jesse W. Star, Jr., submitted to the city of Marion a proposition to erect and complete a system of water works according to the plans and specifications given. It specified the number of hydrants to be furnished, upon which the city was to pay an annual water tax, and contained a schedule of rates or water tax to be charged private consumers. The proposition was accepted as of the nineteenth day of April, 1885. On the nineteenth day of May, 1885, it was assigned by Star to the City of Marion Water-Works Company, a corporation, and on or about the same date he agreed with the company to furnish all material and machinery, and to perform all labor necessary to fully construct and complete the water works according to the proposition

Mallory v. City of Marion Water Works Co.

accepted by the city. The consideration he was to receive was the capital stock of the company and seventy thousand dollars of its bonds secured by first mortgage upon all its property. The stock and bonds were issued to Star in accordance with the agreement on the twentieth day of May, 1885. On the twenty-sixth day of September, 1885, Star ordered of plaintiffs the material for which they seek to recover in this action, consisting of iron and bolts for the stand-pipe, of the value of \$592.70, and the order was filled. It is contended that Star was in fact the water-works company; that he claimed to be the company, and was so treated by its officers; and that, although the material was sold to him as an individual, yet, under the circumstances of the case, the lien of plaintiffs should be established as against the company, and the payment by the company to Star be disregarded. W. S. Mallory testifies that the business of plaintiffs was done with Star for the water-works company, but the statement for a mechanic's lien which was filed by plaintiffs shows that the account was made and the lien claimed as against Star alone. It is neither alleged nor shown that there was any fraud on the part of Star in his transactions with plaintiffs. It is shown that he occupied to the company the relation of a contractor who had received payment in full before the agreement with the subcontractor was made, and therefore the lien of plaintiffs cannot be established as against the water company. *Roland v. Railway Co.*, 61 Iowa, 380; *Stewart v. Wright*, 52 Iowa, 337. The officers of the company were required to be stockholders, and some question is raised as to whether the officers held their stock in good faith. It is not shown that they did not so hold it, nor is the validity of the corporation questioned. The evidence fails to show any valid claim of plaintiffs against the water-works company. The judgment of the district court is therefore

AFFIRMED.

CLARK V MAURER *et al.*

Specific Performance: SALE OF LAND: BAD FAITH OF PURCHASER: EVIDENCE. The evidence in this case, though conflicting (see opinion), *held* to show that defendant left the land in question with W., a real-estate broker, to be sold on commission; that he had reason to believe, and did believe, that W. and plaintiff were members of the same firm, and that it was the firm, and not W. alone, that was to sell the land; that at all events W. and plaintiff had been partners, and were at the time on very intimate terms, and mingled more or less in land and other business; that W. contracted the land to plaintiff for a very inadequate price, and that defendant executed the contract without reading it, or knowing that plaintiff was the purchaser, after he had been offered a greater price, on the statement of W. that to refuse to execute it would cause litigation. After he learned that plaintiff was the purchaser he refused to make the deed, and this action is to compel specific performance. *Held—*

- (1) That plaintiff was not a purchaser in good faith and could not have the aid of equity to consummate his attempted fraud.
- (2) That although the evidence of the fraud might not be sufficiently strong to justify a court in setting aside the contract on that ground, the same degree of evidence is not essential to justify the refusing to plaintiff the relief asked, since such relief is largely discretionary with the court, and depends chiefly on the good faith of the party asking it.
- (3) That defendant's negligence in not reading the contract did not justify an order for specific performance notwithstanding plaintiff's bad faith.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MAY 28, 1889.

ACTION for specific performance of contract for sale of lands. Judgment for the defendants, and plaintiff appeals.

Joy, Hudson & Joy and Craig L. Wright, for appellant.

J. H. Swan, M. Neilon, and S. F. Lynn, for appellees.

77	717
87	51
77	717
96	590
77	717
122	202

GRANGER, J.—On the sixteenth day of February, 1887, the defendant J. G. Maurer made to the plaintiff a written contract, by the terms of which he agreed to make to the plaintiff a deed of twenty acres of land in Woodbury county, if certain specified payments should be first made. No question is made as to payments, but the defendant J. G. Maurer seeks to avoid the decree for specific performance against him sought in this case, on the ground of alleged fraud by plaintiff in obtaining the contract. The land in controversy is situated about three miles from the business center of Sioux City. The land was bought by Maurer of one Camp on the fifteenth day of February, 1887, for fifty dollars an acre, and was bought with a view to speculation. One McPherson, having a mortgage on the premises, is a defendant in the case, and has some interest with Maurer in the profits of the transaction. At this time the plaintiff and his brother were real-estate dealers in Sioux City. J. W. Weldon was at the time residing in Sioux City, and was a brother-in-law to the plaintiff, and there is some claim that Weldon was at the time a partner with Clark Bros. On the day of the purchase of the land by Maurer he went to the office of Clark Bros. to make inquiry as to the price of lands; and as to what occurred there and afterwards there is much conflict in the testimony, but, as a result of that and other conferences, the contract in question was made. The essential dispute or controversy between the parties is this: Maurer maintained that, as a result of his talk with Weldon and Clark, he left the land with the firm, composed of whoever it might be, for sale, and for the sale they were to receive a commission of one hundred dollars. The claim of the plaintiff is that the firm of Clark Bros. had no contract or arrangement whatever with Maurer, but that he left the land with Weldon for sale, for the specified commission, and that Weldon, in pursuance of that arrangement, sold the land to the plaintiff, and that in fulfillment thereof the contract in question was made.

Clark v. Maurer.

From the testimony we are satisfied that when Maurer went to the office of Clark Bros. he went there to consult the firm, and there was much to cause one not familiar with the actual facts to suppose Weldon was a member of the firm. Weldon had been a partner with the plaintiff, and the sign at the entrance bore the name of Weldon as a member of the firm. It is true that the plaintiff and Weldon, in 1884, organized the firm of "Clark & Weldon," and as such engaged in the real-estate and other business, and did business in the same place as on the fifteenth of February, 1887. In 1885 the firm was changed to "Clark Bros. & Weldon," and continued the same business (real-estate and trading land for goods). There was a firm of "J. W. Weldon & Co.," and Clark Bros. had an interest in that firm. January 1, 1886, there seems to have been a dissolution of the firm of Clark Bros. & Weldon, and a notice of the dissolution published in the Sioux City Journal, but no showing that Maurer ever knew of the dissolution. Weldon and the plaintiff have lived in the same house since January, 1886, and during all the time they have mingled together more or less in land and other business.

From a careful review of the testimony, conflicting as it is, we are led to the conclusion that Maurer, when he left the land for sale, supposed he was leaving it for sale by a firm of which the plaintiff was a member. Many witnesses were examined as to the value of the premises at that date, and under such testimony, fairly considered, its market value was not less than one hundred and twenty-five dollars per acre. The estimates by dealers put it from seventy-five to two hundred dollars. The sale to plaintiff was made at sixty-dollars. On the next day Maurer was offered seventy-five dollars, and this was made known to Weldon and plaintiff before the contract was signed, and hence Maurer signed it in the face of a much better offer, but urges that he only did so under the representations by Weldon and plaintiff that plaintiff had sold the land to an outside party, residing in Kansas City, that

Clark v. Maurer.

money had been paid thereon, and that a failure to comply would result in litigation. As to all this there is also a conflict of evidence, but we think it preponderates with the defendant.

The plaintiff is contradicted as to his statements by several witnesses, wherein he is said to have stated that he made the sale for Maurer. Weldon and Harry Clark are also contradicted as to statements made by them seriously impairing their testimony. It is true that Maurer is in the same manner contradicted, but his position has far more corroboration than that of the plaintiff. Maurer signed the contract, and it contained the name of plaintiff as grantee. He says in testimony that he did not read the contract, or know that Clark was the grantee. If the plaintiff was seeking an enforcement of the contract otherwise than by decree for specific performance, we should attach far more significance to this feature of the case. It is true that he should have read and known its contents, but, conceding the fact of negligence in that respect, we do not understand that it so changes the rule as to entitle a party to a decree for specific performance where he is himself in the wrong. The duty as to granting this relief is largely discretionary with the court, and its exercise does not depend so much upon the fact of negligence of the party against whom it is sought as upon the good faith of the party asking it. To justify a refusal of the decree in this case, it is not necessary that our action should be based on the same degree of proofs that would justify setting aside the contract for fraud, or even mistake. It should be granted only when equity and good conscience seem to require it. The rule, as followed by this court, is clearly stated in *Palo Alto Co. v. Harrison*, 68 Iowa, 81. Whatever may be the rights of the plaintiff in an action at law, we do not think he makes that equitable showing in his own behalf to entitle him to the relief prayed.

AFFIRMED.

OCHELTRREE *et al* v. HILL.

Partition: RIGHT OF ONE CO-PLAINTIFF TO ASSIGN AND DISMISS: INTERVENTION OF ASSIGNEE: RES ADJUDICATA. One of the plaintiffs in this action for partition was the devisee of a life-estate in the land, but in the petition she claimed only a fractional share. After the petition had been filed, but before any pleading or claim of any kind had been filed presenting an issue against her, she assigned to H. her life-estate, and filed in the court a statement of that fact and a dismissal of the action as to her on that ground; but the court entered judgment confirming the shares as set out in the petition, and appointed referees to partition the land. Afterwards, on the intervention of H., asking for a dismissal of the cause, and upon the motion of himself, his assignor and all of the defendants, praying for a dismissal, the court modified the judgment so as to substitute H. in the place of his assignor in the partition. Afterwards H. filed a supplemental petition of intervention, setting up his life-estate, and asking that it be established against the premises. On this issue the court found that he had received all the equity to which he was entitled in the judgment for partition, as modified. *Held—*

- (1) That, under section 2844 of the Code, H.'s assignor had a right to dismiss the action as to herself, and that thereafter she was not a party thereto, and that the judgment of partition did not bind her. If other parties desired to proceed with the cause as against her, they should have made her a party defendant. (Code, secs. 2547, 2551.)
- (2) That the judgment of partition did not bind H. as assignee, because neither he nor his assignor was a party at the time it was rendered,—his intervention not having occurred till after that time.
- (8) That the court erred in holding, in effect, that the issue as to H.'s life-estate was adjudicated in the judgment in partition, since neither he nor that issue was then before the court.
- (4) That the cause should be remanded to retry the cause on the application for partition, regardless of the prior adjudications, giving full opportunity to amend the pleadings and make new parties.

Appeal from Cedar District Court.—HON. J. H. PRESTON, Judge.

FILED, MAY 28, 1889.

SEPTEMBER 8, 1873, James Edminston died testate, leaving as his widow the plaintiff Margaret Ocheltree, who has since intermarried with the other plaintiff, William Ocheltree. The will of Edminston contains the following clause: "I give and bequeath to my wife, Margaret, all my estate, real and personal, that I may have in my possession at the time of my demise, during her natural lifetime." The will contains a residuary clause as to other heirs, among whom was a daughter, Rebecca Ocheltree, the then wife of plaintiff William Ocheltree. Rebecca's interest in the residuary estate was three-eighteenths. She afterwards died, and her husband, William Ocheltree, succeeded to one-third of her interest. He afterwards married the widow of Edminston, as before stated, who joined him in instituting this suit. The petition is in the usual form for partition of real estate, and contains the following clause: "That the interest of said heirs in and to the said real estate is as follows: Margaret Ocheltree, undivided one-third; Samuel Edminston, one-sixth; William Edminston, two hundred dollars and one-sixth; Christopher Edminston, one-sixth; William Ocheltree, one-eighteenth; Mary McGilvary, one seventy-second; Hannah Garey, one seventy-second; James Jones, one seventy-second; Fanny McLean, one seventy-second; Eunie Starrett, one seventy-second; Minerva Whitmer, one seventy-second; Margaret Virginia Ocheltree, one seventy-second; Wilson Gilliland, one two-hundred and sixteenth; Caroline Marshall, one one-hundred and eighth." The petition recites that there are encumbrances by way of mortgages on the premises, and costs in the estate yet unpaid. It asks for judgment confirming the shares as alleged, and for partition by a sale and distribution of the proceeds according to the respective interests. A copy of the will is attached to the petition as an exhibit. The petition was filed April 17, 1884, and, as we understand, the heirs were made defendants. August 23, 1884, Margaret Ocheltree filed in court her written dismissal of the action, assigning as reason

Ocheltree v. Hill.

therefor that since the commencement of the action she had sold her interest in the real estate, and agreed with the purchaser to dismiss the petition. Notwithstanding the dismissal, on the twenty-fourth of August, 1884, judgment was ordered confirming the shares as alleged, and for partition, and referees appointed to carry into effect the judgment of the court. August 27, 1884, Margaret Ocheltree filed in court her motion to set aside the order made, because of her written dismissal on file, and because the attorneys for the defendants were not present when the order was made. September 1, 1884, William Hill, being the purchaser of the interest of Margaret Ocheltree, intervened, stating for cause that he had purchased the life-estate of Margaret Ocheltree in the premises, giving her in payment a life annuity, and asked that the cause be dismissed at plaintiff's costs. September 5, 1884, Margaret Ocheltree, William Hill (intervenor) and all the defendants filed a motion asking that the cause be dismissed. On the nineteenth day of September, 1887, the court passed the following order: "And now on the nineteenth of September, 1887, this case comes on for trial upon the issues joined herein, and the court, having heard the evidence and the arguments of counsel, and examined the papers and proceedings herein, finds that the decree heretofore entered herein should be modified so as to substitute William Hill in the place of Margaret Ocheltree, and that he should be entitled to the same share and interest in the distribution of the estate as she was found entitled to in said decree, and such as she was entitled to under the prayer of her petition, but not otherwise, and no greater interest than she would be entitled to thereunder; and the referees are ordered and directed to pay the liens as shown by the abstract, and also the lien of William Ocheltree, administrator, it being the amount shown to be due him as administrator of the estate of James Edminton, deceased; and, after the said debts are paid, the balance to be distributed to the parties in accordance with their respective interests; and that William Hill, as purchaser of any of the interests of the persons

Ocheltree v. Hill.

heretofore adjudged to be heirs, shall be entitled to receive their said interest. All of which is finally ordered, adjudged and decreed." October 22, 1887, William Hill filed his supplemental petition as intervenor, stating that since the commencement of the action he had purchased the interest of the heirs to the estate, so that he owned more than one-half of the land in fee, as well as the life-estate of Margaret Ocheltree; that William Ocheltree is the only heir desiring a partition of said land; that the decree heretofore entered by mistake or inadvertence makes no provision for the life-estate he has purchased of Margaret Ocheltree, and asks that the life-estate be established against the premises. November 23, 1887, William Ocheltree filed an answer to intervenor's petition, averring in substance: (1) That by reason of the failure of Margaret Ocheltree to claim in the original petition for partition a life-estate, she is now estopped to make such claim; (2) that by virtue of the decree then entered the rights of the parties were fixed. The record discloses other petitions and records of the court, with which we do not think it advisable to encumber the opinion. A judgment was entered unfavorable to the intervenor, from which he appeals.

Brink, Wolf & Hanley, for appellant.

Wheeler & Moffit, for appellee.

GRANGER, J.—If parties shall think that this cause has been considered without a proper understanding of the facts, they must understand that is because of the confused and unsatisfactory condition of the record. With more than usual pains to understand it, we approach the consideration with many doubts. There seem to be two cases, bearing numbers as 2,443 and 2,505. While these numbers are often used in the pleadings and orders of the court and the records in the different cases as set out, the cases are nowhere identified by number in the record, and the relations of the

Ocheltree v. Hill.

different proceedings are in doubt. In one of the pleadings no less than four exhibits are referred to, and papers are appended, but without designation as an exhibit, and in regard to some we may be mistaken. The final order seems to have been made on the same day in the two cases as numbered, and the appeal seems to be from both orders. As we understand the partition case,—being the one entitled first above,—it is number 2,443, and number 2,505 is a suit of Margaret Ocheltree and William Hill to enjoin the referees from making the sale of the premises under the order of the court made in number 2,443. The appeal presents a question in each of the cases for us to consider.

I. Appellant claims that the court erred in not recognizing his claim for the life-estate of Margaret Ocheltree. The ground upon which the court refused the claim in this case is that the equities of his claim had been settled in case number 2,443. To an understanding of the adjudications, and how they affect the appellant, it will be necessary to know who were parties to be affected by the issues tried at the different stages of the proceedings. In the proceeding for partition,—number 2,443,—after notice and filing of the petition, the plaintiff, Margaret Ocheltree, dismissed the proceeding by a writing to that effect filed in the cause. The order of the court, affirming the shares, and for partition, was made after this dismissal, and we think it important to enquire if the order in any manner affects her or her assignee. It seems to have been the view of the court that she could not dismiss the action, even as to herself, so as not to be bound afterwards by the proceedings. At least we infer this from the orders made after the attempted dismissal. That she could not dismiss the action as to her co-plaintiff may be conceded, but as to herself we think she may do so, and that such was the legal effect of the dismissal filed. Code, section 2844, provides that an action may be dismissed by the plaintiff before the final submission of the cause to the jury or to the court. There is no express provision for a dismissal by one of two or more plaintiffs, but there is

Ocheltree v. Hill.

nothing in the letter or spirit of the law to require a co-plaintiff to remain and prosecute a cause when in his judgment neither the right nor his interest requires him to do so; and, although he may not be able to dismiss the action, he may do so as to himself. If parties to the action desire his presence in court for the further prosecution of the action, the provisions of the Code are ample to secure his presence by making him a compulsory party. Code, secs. 2547, 2551. With this holding, Margaret Ocheltree was not a party to this proceeding when the order for partition was made, and is in no manner bound thereby. From the time of filing her dismissal, she made known to the court fully that she had sold her interest in the premises, and had no rights there to be determined by the court. When she withdrew from the action, no pleading or claim of any kind had been filed presenting an issue against her, and before her rights could be affected she must in some manner have been interpleaded. If she was in no manner affected by the order of the court, her assignee would not be, merely by virtue of the assignment. If, then, Hill is affected by the judgments of the court, it must be in consequence of his intervention.

It is, however, urged that the remedy by appeal is lost, the order for partition having been made in August, 1884. We have held that at the time of such order Margaret Ocheltree was not a party, and the order could have no application to her, and at that time Hill was not a party. Hill became a party by intervention, September 1, 1884, and asked the dismissal of the cause on the ground of his having purchased the life-estate of Margaret Ocheltree. No ruling appears on this application, and on the nineteenth of September the court modified its order as shown in the above statement of the case. October 22, Hill filed his supplemental petition, which was answered by the plaintiff, William Ocheltree. This issue presents the question of the life-estate claimed by the intervenor, and on this issue the court holds that it "finds that said William Hill and others have in the disposition of number 2,443 received

Russell v. Huiskamp Bros.

all the equitable relief to which they are entitled." In number 2,443 we have held that Margaret Ocheltree dismissed the action as to herself, and as to the intervenor Hill the record nowhere shows any issue or decision on that question, unless it be the order set out in the statement of facts above. Hill's relation to the case at that time was that of an intervenor merely, asking a dismissal on the ground of having purchased the life-estate. His application was not answered, nor was any issue whatever taken as to his rights. In his application he claimed nothing adverse to either party, nor did either party seek an adjudication against him. There was no record on which a judgment could be based against him. We think the court erred in finding that the question of the life-estate of intervenor had been adjudicated. With the condition of this record we are not inclined to decide as to the validity of the life-estate. We think the case should be remanded to the district court, with instructions to retry the cause on the application for partition, unaffected by questions of prior adjudications in any of the proceedings now before us; giving full opportunity to amend the pleadings, and make new parties, to the end that the legal and equitable interests of all the parties may be fully attained, and it is so ordered. REVERSED.

RUSSELL V. HUISKAMP BROS. *et al.*

1. **Fraud: DEGREE OF PROOF: INSTRUCTION.** Fraud is established by the proof of circumstances which lead naturally and fairly to the conclusion of fraud; and a clause in an instruction in this case, which, in effect, told the jury that the proof must be such as to make the inference of fraud irresistible, was error, and it was not cured by the other language of the instruction: (Compare *McCreary v. Skinner*, 75 Iowa, 411; *Turner v. Younker*, 76 Iowa, 258.)

Russell v. Huiskamp Bros.

2. **Conversion: OF PROPERTY BY SHERIFF: PLEADING: INSTRUCTIONS: DAMAGES.** In an action against a sheriff for the value of goods wrongfully taken on execution, though the petition only alleged a wrongful taking, instructions which implied a conversion of the goods were without prejudice to defendants, where their answer showed, and it was conceded, that the goods were taken and sold,—the damages in any case being the value of the goods, with interest.

Appeal from Mills District Court.—HON. A. B. THORNELL, Judge.

FILED, MAY 28, 1889.

THE plaintiff seeks to recover the value of a stock of goods and fixtures, of which she alleges the defendants wrongfully took possession. There was a trial by jury, and a verdict and judgment for plaintiff. The defendants appeal.

J. F. Smith, for appellants.

Stone & Gilliland, for appellee.

ROBINSON, J.—The property in controversy was levied upon and taken by defendant Farrell as sheriff, by virtue of three executions issued in favor of defendants Huiskamp Bros. against the property of C. V. B. Russell, who is the husband of plaintiff. It is claimed by plaintiff that the original stock of goods was purchased on the twenty-second day of July, 1882, by A. J. and L. W. Russell; that they employed J. J. Woodrow to take charge of the goods, and said C. V. B. Russell to assist him, for about two years; that Woodrow then left, and C. V. B. Russell had charge until some time in April, 1887; that on the twenty-third day of that month the plaintiff purchased the stock and appurtenances, including trade fixtures, and took possession of and owned the property so purchased, and remained in possession until it was taken by defendants, on the sixth day of the next August. It is claimed by defendants that the property was in the actual possession of

Russell v. Huiskamp Bros.

the husband when taken, and that it was in fact then owned by him, and that the alleged ownership of plaintiff was colorable only, and taken and held by virtue of a conspiracy to hinder, delay and defraud the creditors of the husband.

I. The court charged the jury as follows: "The burden is upon the defendants to show that the transactions in question were fraudulent as to the creditors of C. B. V. Russell, by preponderance of the evidence. You are instructed, however, that fraud can seldom be shown by direct evidence. It is usually found by showing facts and circumstances from which the inference of fraud naturally and irresistibly arises, and, if such facts and circumstances are proved by the evidence, and they are of such a character as to produce in your minds a conviction of the fact of fraud, then it must be considered that fraud is proved; but in considering said matter you must consider only such facts and circumstances as are shown by the evidence, and if the matters shown in evidence, when all taken together, and carefully weighed and considered, are as consistent with an honest as with a fraudulent purpose, then fraud is not shown. If the evidence shows that the alleged title of plaintiff to the property in question was fraudulent, as before explained, your verdict should be for the defendants." We held in the case of *McCreary v. Skinner*, 75 Iowa, 411, that it was error to charge the jury that "fraud is not to be presumed without proof, yet, like any other fact, it may be proved by circumstances from which the inference of fraud is natural and incontrovertible; and, if such circumstances are of such character as to produce in your mind a conviction of the fact of fraudulent intent, it will then be established." In *Turner v. Yunker*, 76 Iowa, 258, an instruction which stated that fraud might be established by proving "circumstances from which the inference of fraud is natural and irresistible," was condemned. The portion of the charge in this case which we have quoted falls within the rule of these cases, and is clearly erroneous. It is

1. FRAUD:
degree of
proof:
instruction.

Russell v. Huiskamp Bros.

urged by appellee that the charge, taken as a whole, cures the defect, but we think that is not correct. Fraud was pleaded in the answer, and defendants relied upon circumstantial evidence to prove it. The jury were told, in substance and effect, that fraud could not be established by a preponderance of the evidence, but that the proof must be such as to make the inference of fraud irresistible. That was erroneous. The objectionable part of the charge was in effect a direction of the jury as to the weight of evidence necessary to establish the defense. Its natural and probable effect was to mislead, and it should not have been given.

II. Appellants complain of certain rulings and portions of the charge of the court, on the ground that they assumed the conversion of the property in controversy to be in issue, while the petition only charged a wrongful taking. The answer shows that the goods were sold by defendant under a claim of right, and, since there is no dispute as to the fact that the property was taken and sold by defendants, the alleged errors were without prejudice. If plaintiff is entitled to recover, the measure of her recovery must be the value of the property taken, with interest.

III. Other questions are presented for our consideration, but most of them are of such a nature that they are not likely to arise on another trial. Some of them relate to the refusal of the court to give certain instructions asked by defendants. So far as such instructions incorporated the law, they seem to have been, in substance, given in the charge of the court. Others, which were founded upon the evidence, need not be considered. For the error in the charge which we have pointed out the judgment of the district court is

REVERSED.

DRAKE V. PAINTER *et al.*

1. **Contract: PARTY: HUSBAND AND WIFE: EVIDENCE.** Plaintiff, a married woman, under an oral contract which she alleged she made with her mother and her mother's husband, took possession of and resided in the mother's house, and maintained the mother and mother's husband therein during the mother's life, in consideration of having the property on her death. The mother's husband lived with her and was provided for and supported by plaintiff. *Held* that he must be regarded as a party to the contract, though he testified that he did not know of or concur in it.
2. **Evidence: ORAL CONTRACT WITH ONE DECEASED.** One who is in the possession of real estate and claims to own it under an oral contract with a former owner, since deceased, may testify to the oral contract under which he claims, as against one who is seeking to subject it to the satisfaction of a judgment against an heir of the decedent. The judgment creditor in such a case is not one of the persons against whom section 8639 of the Code forbids such testimony.
3. **Homestead: ALIENATION: ORAL CONTRACT CONSUMMATED BY ABANDONMENT.** Plaintiff, a married woman, after having furnished her mother's house, under an oral contract with her mother and her mother's husband, took possession of it with her family, and thereafter supported her mother and her mother's husband therein, in consideration of the property becoming hers at her mother's death. It had been the mother's homestead. *Held* that when plaintiff took possession it became her homestead,—the mother and her husband abandoning it in consummation of the contract,—and that the performance by plaintiff of her oral contract gave to her the right and equity to the property, notwithstanding section 1990 of the Code, requiring the husband and wife to concur in and sign the same joint instrument in order to convey their homestead.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, MAY 28, 1889.

ACTION in chancery to restrain and enjoin the sheriff and a judgment plaintiff from offering for sale, upon an execution, a certain house and lot, and to

77	731
79	825
77	731
96	411
99	550
77	731
103	104
77	731
111	364
77	731
123	550
77	731
127	137
77	731
129	147
129	357
77	731
134	116
77	731
135	239

Drake v. Painter.

declare the property exempt from the lien of the judgment upon which the execution was issued. The relief prayed for was granted by the decree. Defendants appeal.

L. G. Bannister and Baylies & Baylies, for appellants.

Chas. A. Bishop, for appellee.

BECK, J.—I. The petition alleges that plaintiff is the owner in fee of a house and lot in the city of Des Moines, which she acquired under an oral agreement with Letitia Tisdale and Dennison Tisdale, her mother, and the husband of her mother, under which she took and held possession of the property; that Letitia left, with other heirs, W. J. Vinnedge, a son, against whom the judgment was rendered which is sought to be enjoined in this case. It is claimed to bind an interest in the property which W. J. Vinnedge holds as an heir of Letitia. The answer alleges that Letitia, the mother of plaintiff and W. J. Vinnedge, was a married woman, and with her husband occupied the property in question as a homestead, and joined in no written instrument conveying it, which alone, under the statute, is sufficient to pass title to the homestead; that the property descended to W. J. Vinnedge and other heirs at law, and that defendants seek to enforce the judgment against him by the sale of his interest in the property.

The evidence establishes the following facts: Plaintiff is the daughter of Letitia Tisdale, who was the wife of Dennison Tisdale, and the mother of W. J. Vinnedge. The mother and her husband were in the occupancy of the property as a homestead. The mother, who, from age and infirmities, was burdened with the discharge of domestic duties, proposed to plaintiff and her husband that they should take the homestead, and occupy it, giving the mother and her husband a living and support in the daughter's family, and that the plaintiff

1. CONTRACT:
party: hus-
band and
wife: evi-
dence.

Drake v. Painter.

should thus acquire the title to the property. The husband assented to this contract, and became a party to it. Thereupon plaintiff and her husband went into possession of the property, and fully performed their contract to supply a living and support to the mother and her husband. The plaintiff owned all of the household furniture in the house at the time of the arrangement. Having before furnished the house, it continued to be her property. None of these facts are disputed, except that the husband of plaintiff's mother denies that he knew of or concurred in the contract between his wife and plaintiff. But he does not deny that he lived with his wife, and was provided for and supported by plaintiff. We think the evidence establishes that he was a party to the contract, and did assent to it, and take the benefits under it.

II. Plaintiff and her husband, against defendants' objection, were permitted to testify to the making of the oral contract between plaintiff and her mother. Defendants insist that this evidence is not competent, under Code, section 3639, which is in this language: "No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person, at the commencement of such examination, deceased, insane or lunatic; against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence."

2. EVIDENCE:
oral contract
with one
deceased.

It will be readily seen that under this statute plaintiff and her husband, who are claiming under an oral contract between them and the mother now deceased, cannot testify in support of the contract in an action against "the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor" of the mother. Is plaintiff's action against any of these persons? We think not. It is plain that the defendants cannot be designated or described as being any one of these persons. It may be said that the creditor, attempting in this case to enforce his judgment, is setting up and attempting to enforce his debtor's interest in the estate. But there is no privity of blood or contract between him and his debtor. Their interests are adversary. It is true that the debtor ought to aid the creditor in enforcing his judgment. At least, he ought not to resist the creditor in his efforts in that direction. But the debtor is neither bound in law nor morals to aid or not to resist the creditor's efforts to enforce his judgment against property not owned by the debtor. It is therefore readily understood that the statute is for the aid and protection of the estate, heirs, etc.,—persons named in the section,—the privies of the deceased person, and not strangers who are attempting to resist the enforcement of contracts made by the deceased. The judgment debtor in this case does not ask the protection of the statute. Indeed, he has nothing to protect, so far as the lot in question is concerned. He testifies to facts showing that it is not his property. Surely, the statute will not be so wrested as to operate, as an instrument of wrong, to rob plaintiff of her property, when it was designed to protect the privies of her deceased mother, none of whom are demanding protection under it or are parties to this action.

III. Counsel for defendants insist that, conceding the oral contract as it is claimed by plaintiff, it does not convey or affect the property, for the reason that it was at the time the homestead of the parties. They base their position upon Code, section 1990, which provides that "a

8. HOMESTEAD :
alienation :
oral contract
consummated
by abandon-
ment.

Drake v. Painter.

conveyance or encumbrance [of a homestead] by the owner is of no validity, unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." This provision affects no transactions other than those pertaining to homesteads. Was the lot in question the homestead of the mother and her husband? It will be remembered that the mother and her husband were occupying the house as their homestead. The furniture was owned by plaintiff. The plaintiff and the mother, with her husband, entered into the oral contract for the transfer of the lot, which was only completed and made valid and binding by plaintiff's entering into the possession of the property, which she did, and became the occupant, with her husband, of the house. After this occupancy, whose homestead was it? Clearly, plaintiff's. She and her husband were the united head of the family. It was their house and their homestead. It was not the mother's homestead, unless it be held that two families, one boarding and supporting the other, both hold the one homestead. But they cannot so hold, for the property became plaintiff's homestead, and her rights thereto would be defeated by recognizing a homestead interest in another. When did the property become plaintiff's homestead? Upon its occupancy by her. The act—occupancy—which made it plaintiff's homestead terminated her mother's homestead rights. It is clear that, as the act of occupancy was the consummation of the contract between plaintiff and her mother, the mother at the time abandoned her homestead in the lots. This is so for the reason that the mother's occupancy as a homestead ceased before plaintiff's began, for, as we have seen, the two could not have occupied independently as holders of different homestead rights. Thereupon, when plaintiff's contract was consummated, her mother had abandoned the homestead; it was her homestead no longer. It was then competent for her and her husband to contract by parol, jointly or separately, for the disposition of the homestead. We conclude, therefore, that plaintiff's oral contract with her mother and mother's husband is

Gafford v. Amer. Mortgage & Investment Co.

valid, and passed to plaintiff the right and equity to the property; and that, as W. J. Vinnedge, the defendant in execution, has no interest therein, it is not subject to defendant's judgment and execution. These considerations dispose of the case. The judgment of the district court is

AFFIRMED.

GAFFORD V. THE AMERICAN MORTGAGE AND INVESTMENT COMPANY.

1. **Evidence: SECONDARY: FOUNDATION FOR: NOTICE TO PRODUCE PAPERS.** Plaintiff gave defendant timely notice to produce on the trial the original record of the meeting of its directors on a given date, including the record of a certain resolution material to the case, and informing defendant that if the original record was not produced, parol evidence of its contents would be introduced at the trial. *Held* that this was sufficient foundation, upon a failure to produce the original, to justify the introduction of a copy of the record in question, which a witness, a former officer of defendant, and who showed that he was familiar with the original record of the resolution named in the notice, testified to be a true copy of it. (See *Greenough v. Sheldon*, 9 Iowa, 506.)
2. **Verdict: EVIDENCE TO SUPPORT: ACCEPTANCE OF DRAFTS: SETTLEMENT.** A railroad company of which plaintiff was president drew drafts on the defendant in favor of the plaintiff, which defendant accepted. In an action on the drafts, it appeared that plaintiff, as president of the railroad company, made a demand upon the defendant for settlement for bonds sold; and the evidence tended to show that the defendant was then owing the railroad company on account of bonds much more than the amount of the drafts, and that the drafts were given in settlement. *Held* that a general verdict for plaintiff, and a special finding that the drafts were accepted in settlement of a disputed claim made by the railway company, and that defendant had not paid that company the amount due for its bonds, were sufficiently supported by the evidence.
3. **Corporation: POWER OF OFFICER TO SETTLE DISPUTED CLAIM.** The purchase of bonds and the paying for them were within the ordinary business of defendant. Its treasurer was authorized to make such purchases for defendant, and to make payment. *Held* that he was also authorized to determine the amount unpaid, even to the extent of compromising a dispute in regard to it.

Gafford v. Amer. Mortgage & Investment Co.

4. **Consideration: FOR DRAFTS: BURDEN OF PROOF: PLEADING.** The drafts sued on import a consideration. (Code, sec. 2113.) It was not, therefore, necessary for plaintiff to plead or prove it in the first instance; and where the answer set up want of consideration, these averments were denied by operation of law, without a reply, and it was competent for plaintiff, under the issues thus raised, to show that the drafts were accepted in compromise of a dispute.
5. **Corporation: POWER OF TREASURER: EVIDENCE.** In an action on drafts accepted on behalf of the defendant by its treasurer, where there was *prima-facie* evidence that the defendant's records gave the treasurer authority to accept the drafts, which record was not disputed, *held* that the testimony of a witness for defendant, that he found nothing of record in the books of defendant to show that the treasurer had such authority, was properly stricken out on motion as being but the conclusion of the witness.

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, Judge.

FILED, MAY 29, 1889.

ACTION at law to recover the amount of two drafts drawn on and alleged to have been accepted by defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Gatch, Connor & Weaver, for appellant.

Kauffman & Guernsey, for appellee.

ROBINSON, J.—On the fourteenth day of January, 1885, the Union Street Railway Company of Burlington drew on the defendant three drafts, for one thousand dollars each, payable to the order of plaintiff. They were accepted on the day of their date in the name of defendant, by its treasurer. One of the drafts was paid, and the others are involved in this action. The defendant claims that the drafts were accepted without authority and without consideration.

Gafford v. Amer. Mortgage & Investment Co.

I. There were two trials in the court below, the first one resulting in a disagreement of the jury. Before the first trial plaintiff served defendant with

1. EVIDENCE:
secondary :
foundation
for : notice to
produce
papers.

notice to produce on the trial of the cause the original record of the meeting of its board of directors held on or about the third day of July, 1882, including the record of a certain resolution giving to its president and treasurer, and to each of them, full power to execute contracts for the payment of money to convey real and personal estate, and to purchase and sell securities. Said notice also informed defendant that, if the original record was not so produced, parol evidence of its contents would be introduced at the trial. The original record was not produced, whereupon one B. L. Harding testified that in the year 1882 he was vice-president, a director and member of the executive committee of defendant, and continued in such position until April, 1885; that the eastern office of defendant was in Boston; that he was frequently in Boston, and present at many meetings of the board of directors, and was well acquainted with their action; that he was familiar with the original record of the resolution named in the notice; and that an exhibit shown him contained a true copy of it. The exhibit was then introduced in evidence, over the objection of defendant. We think it was properly so introduced. Harding's testimony, on cross-examination, was not entirely satisfactory, it is true, and he stated that he could not write a copy of the resolution from memory alone, but his admitted relations with defendant were such that he would naturally become familiar with the resolution. The exhibit was in the handwriting of the secretary of defendant, and Harding testified positively that it was a copy of the original. Defendant was in possession of the original, and was given ample opportunity to produce it. After it knew that the copy would be offered if the original was not produced, it took the depositions of several of its officers, but made no effort whatever to contradict the alleged copy. Under these circumstances, it may fairly be presumed that the exhibit is as favorable

to defendant as the original record would be, and whether it was so or not is immaterial. Defendant alone had the power to show the facts, if they were not as represented in the exhibit, and, having failed to do so, cannot now be heard to complain. It is said the ruling of the court was contrary to the decision in *Beebe v. Association*, 76 Iowa, 129, but that case involved the procuring of a rule for the production of original papers, and is not in point. The question under consideration is the sufficiency of the foundation laid for the introduction of secondary evidence. That evidence of the contents of a book or paper in the possession of the adverse party may be given, if he refuses to produce it after the giving of reasonable and proper notice, is well settled. *Greenough v. Sheldon*, 9 Iowa, 506; 1 Greenl. Ev., sec. 560, and note; 2 Phil. Ev. 519.

II. The Union Street Railway Company was organized and incorporated under the laws of Iowa in the month of February, 1884. Soon after its organization was perfected it issued one hundred and twenty-five thousand dollars in bonds, which were sold to defendant at ninety-five cents on the dollar. The defendant was an Iowa corporation, organized to negotiate, purchase, hold and sell bonds, certificates of stock, notes and other evidences of debt, including securities of various kinds. Its principal place of business for the state of Iowa was in Des Moines, but its office for the transaction of business outside that state was located in Boston. Harding was one of the organizers of the street-railway company, and was connected with defendant as already stated. He was also president of the Des Moines, Osceola & Southern Railway Company, which was then engaged in building a railway. That company was being assisted in the sale of its bonds by the defendant, and had overdrawn its account, January 1, 1884, in the sum of about forty-five thousand dollars. The property of the street-railway company cost less than sixty thousand dollars, including extensions and improvements; hence the proceeds of the bonds sold to defendant represented a profit

2. VERDICT :
evidence to
support : ac-
ceptance of
drafts :
settlement.

Gafford v. Amer. Mortgage & Investment Co.

of nearly sixty thousand dollars. Plaintiff was made president of the street-railway company, and managed its affairs from the time of its organization until the drafts in controversy were accepted. The street-railway bonds were delivered to Harding, when they were executed, and he delivered them to defendant at its Boston office. He drew a portion of the proceeds of the bonds, and sent nearly sixty thousand dollars to plaintiff. It is contended by defendant that Harding received all the proceeds; that he was authorized to receive them; and that when the drafts in suit were given he had been paid in full. Defendant also contends that, if he was not in fact so authorized, yet the officers of the street-railway company knew that he was drawing the money, and made no objection to his so doing. It is claimed by plaintiff that Harding had no right to receive the proceeds of the bonds, and that he did not know that he had received more than the amount sent to plaintiff at Burlington. A young clerk of Harding, employed in his office at Des Moines, was the nominal treasurer of the street-railway company, but never received any of its funds. Harding claims that, while he received from defendant money to the amount of the purchase price of the bonds, yet he returned a large portion of it. Defendant claims that, if any money was so returned, it was designed to be applied on the Osceola Railway Company accounts. After the street-railway company had been organized several months, plaintiff, as its president, sought of defendant an accounting for the bonds, and was informed that the proceeds had been paid to Harding. Plaintiff visited Harding, and was told that the information he had received from the Boston office was not correct. Harding's claim seems to have been confirmed by further correspondence with the Boston office. Plaintiff was not aware that defendant had purchased all the bonds, and was informed that it had sold but fifty-seven thousand dollars' worth. He went to Boston in January, 1885, and insisted on a final accounting. He had received nothing for his services as president, but had finally agreed with the persons interested in the

Gafford v. Amer. Mortgage & Investment Co.

street-railway company to accept three thousand dollars in settlement of his claim for services. One Smith was the treasurer of defendant, and was also interested in the street-railway company. Defendant refused to account to plaintiff for the bonds it had received, although he then knew it had sold enough to amount to about sixty-three thousand dollars. It was finally agreed that plaintiff should surrender his stock in the street-railway company, that he should resign his office of president, and that he should receive three thousand dollars from defendant in settlement; and the three drafts were drawn and accepted, as already stated, for that purpose. The jury found specially that the drafts were accepted in settlement of a disputed claim made by the street-railway company against defendant, and that at that time defendant had not paid to said company the amount due for its bonds.

Appellant contends at great length and with much ingenuity that the special findings, especially the second one, and the general verdict, are contrary to the evidence, and contrary to the charge of the court; but, in our opinion, it is a case of such conflict of evidence that we cannot say that the conclusion of the jury is unwarranted. It does not appear that Harding was authorized to receive the proceeds of the bonds, and, if he was not, then defendant was owing to the street-railway company much more than three thousand dollars when the drafts in suit were drawn and accepted. It is not disputed that plaintiff was justly entitled to receive three thousand dollars when he received the accepted drafts. He signed a receipt designed to exonerate defendant from further liability on account of the bonds. He states that he explained when he signed it that he intended it to be effectual only for moneys actually paid; but it is not material to inquire into the effect of his intent, nor of the paper which he signed. It is clear that he made a demand of settlement of defendant in good faith; that the demand was not unfounded; that the drafts were given to settle it; and that plaintiff acted as president of the street-railway company in attempting to obtain a settlement.

III. It is insisted by appellant that, even if the authority of the treasurer of defendant to make contracts for the payment of money be conceded, yet such authority would extend only to transactions in the ordinary course of business, and not to the compromise of disputed claims. But the purchase of bonds, and the paying for them, were within the ordinary business of defendant, and it was within the province of the officer who was authorized to make the purchase for the defendant, and to make payment, to determine the amount unpaid, even to the extent of compromising a dispute in regard to it.

IV. It is claimed that the burden of proof to show a sufficient consideration for the drafts was upon plaintiff, and that there was error in the admission of evidence to show that they were accepted in compromise of a claim, because a compromise was not pleaded. The drafts in suit import a consideration. Code, section 2113. It was not, therefore, necessary for plaintiff to plead it, nor to prove it in the first instance. A want of consideration was a matter of defense, to be pleaded and proven by defendant. The averments in the answer of want of consideration were denied by operation of law, and no reply was required. It was entirely competent for plaintiff, under the issues raised by the answer, to show the real consideration of the drafts.

V. A witness was asked whether the treasurer of defendant had any power or authority to accept the drafts in suit, or either of them. He answered: I do not know. *I have found nothing of record in the books of said company to show that he had such authority.* The books and records of the company contain no reference to the drafts sued upon. I have no personal knowledge in regard to the execution of the drafts in suit," etc. The italicized portion of the answer was excluded on the objection of plaintiff. We think the ruling was correct. It simply gave the conclusion of the witness as to the legal effect of what the record contained. An answer of

8. CORPORATION : power of officer to settle disputed claim.

4. CONSIDERATION : for drafts : burden of proof : pleading.

5. CORPORATION : power of treasurer : evidence.

Meloy v. The Chicago & N. W. Ry. Co.

that kind might be admissible under some circumstances, but not where, as in this case, there was *prima-facie* evidence that the record did give the authority in question, which record was not disputed. What we have said on this point will dispose of numerous questions presented by appellant, which need not be further considered.

VI. We have examined the record and arguments of counsel in the case, but fail to discover any error prejudicial to appellant. The judgment of the district court is therefore

AFFIRMED.

77	743
131	733

MELOY V. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1. **Railroads: INJURY TO CONSTRUCTING ENGINEER: RISKS ASSUMED.** A civil engineer engaged in the construction of a railroad track, but not responsible for the condition of the track after it is laid, assumes, by virtue of his employment, the risks incident to the operation of construction trains upon the new track when operated in a reasonably prudent and careful manner. But where he is injured by the derailment of such train through the company's negligence in caring for and keeping in place the new track, and in running over a sunken and miry track at a rate of speed which is dangerous, considering the condition of the track, the company is liable.
2. — — : — — : **NEGLIGENCE: EVIDENCE.** In such case evidence that other trains were run over the track at the same rate of speed on the same day was not admissible for the purpose of showing that there was no negligence in running the train in question; nor was it prejudicial error to exclude it when offered to show that the company had no notice of the condition of the track, since such notice was abundantly proved by other evidence which this could not overcome.
3. — — : — — : **DANGEROUS RATE OF SPEED: EVIDENCE.** Although no witness testified that the speed of the train in question was so great as to be dangerous, the condition of the track was described to the jury as full of short curves, uneven and miry, and at one place sunken out of sight in the mud, and the rate at which the train was run was in evidence. *Held* that from such evidence the jury was justified in passing on the question as to whether the rate of speed was dangerous or not, without the aid of expert or direct testimony.

Meloy v. The Chicago & N. W. Ry. Co.

4. ———: ———: CONTRIBUTORY NEGLIGENCE: CASE FOR JURY. The train in question consisted of a wrecking car, which was next to the engine, an old caboose, used for a tool car, which came next, and in which plaintiff and others of a wrecking crew were riding, three flat cars loaded with rails, three more loaded with ties, and a box car fitted up as a way car, which was at the rear end of the train. Had plaintiff been in the box car he would not have been injured. But it does not appear that plaintiff had any reason to suppose that the box car was a stronger or safer car to ride in than the caboose or tool car, and, so far as the evidence shows, it was no better adapted to the use of travelers than was the tool car, and was less convenient. Besides, the evidence tended to show that plaintiff was on this occasion one of a wrecking crew, and rode in the place provided for them. *Held* that he was not as matter of law guilty of contributory negligence in riding in the tool car, and that the question was properly submitted to the jury. (*Doggett v. Railway Co.*, 34 Iowa, 284, and *Player v. Railway Co.*, 62 Iowa, 727, distinguished.)

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, MAY 29, 1889.

ACTION to recover damages for personal injuries sustained by plaintiff, for which defendant is alleged to be responsible. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Hubbard, Clark & Dawley, for appellant.

Ward & Harman and *Mills & Keeler*, for appellee.

ROBINSON, J.—In the summer of the year 1884 plaintiff was in the employment of defendant, and was engaged as a civil engineer in superintending the laying of the track on a new line of railway which defendant was then constructing from Belle Plaine to What Cheer. He was not required to see that the track was kept in good condition after it was laid. On the third day of August of the year named the track had been laid from Belle Plaine to a point about thirty-five miles

Meloy v. The Chicago & N. W. Ry. Co.

south. On that day plaintiff, who was in Belle Plaine to visit his family, was ordered to go to the front with a wrecking train, which was going down to assist in replacing on the track a derailed engine. The train consisted of an engine, which was run backwards, pushing the tender and pulling the cars; a wrecking car, with derrick, next to the engine; an old way car, fitted up and used as a tool car, next to the wrecking car; three flat cars loaded with steel rails; three loaded with ties; and at the rear end a box car, fitted up and used as a way car. The plaintiff, with other employes of defendant, rode in the tool car. At a point about twenty-one miles south of Belle Plaine the engine, derrick car, tool car and forward trucks of the first car of rails left the track, and the tool car was badly broken. At the moment of the accident plaintiff was standing on a platform of the tool car, whither he had gone, as he states, for the purpose of jumping from the train, under the belief that an accident was imminent. He was caught between two cars in such a manner that his left leg was crushed, making amputation necessary. Other injuries were also received. The evidence on the part of plaintiff tends to show that the track where the accident occurred was in bad condition at that time; that it was laid through a deep cut, over wet, soft earth; that it had settled unevenly, and was out of line; that the condition had been made worse by a storm of rain the night before; and that at the time of the accident the train was running from twelve to seventeen miles an hour. The way car did not leave the track. Plaintiff charges that the train was negligently run at too high a rate of speed over a track known to defendant to be in a dangerous condition, by an inexperienced and incompetent engineer; and that he did not contribute to the injuries of which he complains. The jury found specially that defendant was negligent in maintaining and repairing the road bed and track at the time and place of the accident; that the train in question was "running at a dangerous and negligent rate of speed, considering the condition of the road bed at that place and time;" and that plaintiff was not

Meloy v. The Chicago & N. W. Ry. Co.

guilty of contributory negligence. The amount of the verdict and judgment was ten thousand dollars. An opinion was filed in this cause on a former submission, but a rehearing was granted on the petition of appellant, and the cause again submitted.

I. It is contended by appellant that the risks incident to riding over a new, partially completed road bed and unballasted track were necessarily contemplated in the employment of plaintiff; that the accident in question was a risk of that kind; and therefore that he is not entitled to recover in this action. But plaintiff only consented to incur such risks as were incident to the operation of trains upon such a track in a reasonably prudent and careful manner. He did not assume risks which were the result of running trains at an unreasonably high rate of speed over track in a bad and dangerous condition. Defendant was chargeable with knowledge of the condition of its track at the place of the accident. It knew that it was laid over wet and yielding earth; that proper drains had not been constructed to carry off the rainfalls and the water which came from the banks, and that the storm of the night before had aggravated the bad condition of the road bed, and had made greater caution in running trains over it necessary. There was conflict in the evidence as to the condition of the track and the rate of speed at which the train in question was run, but there was evidence tending to support the special findings of the jury that defendant was negligent in not keeping the road bed and track in better condition, and that it was negligent in the matter of running the train. Plaintiff did not assume any risk resulting from such negligence. He had, it is true, superintended the laying of that portion of the track in controversy, but it was laid several weeks before the accident occurred, and plaintiff's responsibility, therefore, had ceased. It was then in charge of the road master.

II. Appellant complains of the refusal of the court below to allow it to prove that similar trains had been

Meloy v. The Chicago & N. W. Ry. Co.

8. —: —: run at the same rate of speed over the same track on the same day, without any appearance of danger. Appellant was permitted to prove the condition of the track at the time in question, and for some time before. The fact that other trains were run over it just before the accident at the same rate of speed would not justify a negligent and improper running of the train in question. The condition of the road bed was such that the passing over it of loaded trains made it more dangerous. It is urged on rehearing that the evidence was admissible to show that defendant did not have notice of the condition of the road. That point was not made on the first submission of the cause, but it would hardly be sufficient to accomplish the purpose now claimed for it. It might show that the locomotive engineers who ran the trains in question did not know that the condition of the road was bad; but it appears that the engineer who ran the train which was wrecked, the road master, who was directly responsible for its condition, and other employes, knew or were chargeable with the knowledge of its condition.

III. It is further contended by appellant that there was no evidence that the train was run at an unsafe rate of speed. It is true that no witness testified specifically that the speed was too great to be safe. But there was evidence showing that the track was uneven; that it contained short curves caused by the sliding of the track on the wet clay; that in places one side of the track was raised on planks, while the other side was down in the clay, and was, as stated by one witness, "out of sight in the mud." The cars swayed from side to side in such a manner as to cause plaintiff to believe that there was danger that the train would be ditched. The rear brakeman applied brakes without orders, in anticipation of danger, to check the speed of the train. It did not require an expert to tell that the condition of the track made the rate of speed dangerous. It was competent for the jury to find that the train was negligently

Meloy v. The Chicago & N. W. Ry. Co.

run at a dangerous rate of speed from the evidence submitted.

IV. The court charged the jury as follows: "If you find from the evidence that at the time of the departure of the wrecking train on which the plaintiff took passage the defendant had provided a safe and suitable car on said train for the accommodation of the employes of the defendant in riding on said train, then the plaintiff, in the exercise of ordinary care and prudence, was in duty bound to take passage on such car, and if he neglected so to do, and sought a more dangerous part of the train on which to ride, and was thereby injured, then such act was negligence on the part of plaintiff; and if such negligence directly contributed to his own injury, then he ought not to recover. But if you find from the evidence that the defendant had provided more than one car on said train for such purpose,—that is, if in this case you find that the so-called 'way car' and the so-called 'tool car' were both provided by defendant for such purpose,—or if you find from all the facts and circumstances connected with the making up and operating of the train by the defendant that the plaintiff had good and reasonable grounds for believing, and that he did honestly believe, in the exercise of ordinary care and prudence, that both of said cars had been so provided for such purpose, then he was justified in selecting either car for his passage as to him seemed best in the exercise of such ordinary care and prudence,—under such state of facts plaintiff would not be negligent. If you find, however, from all the facts and circumstances connected with the case, that a man of ordinary care and prudence under such circumstances would not have acted as plaintiff did, but that in the exercise of such ordinary care and prudence he would have taken passage in the rear caboose as a safer place, and would have avoided the tool car as a more dangerous place, then the plaintiff was guilty of negligence, and, if such negligence contributed directly to produce his injuries, he ought not to recover." It is insisted by

4 —: —:
 contributory
 negligence:
 case for jury.

Meloy v. The Chicago & N. W. Ry. Co.

appellant that the verdict is contrary to this paragraph of the charge, for the reason that the way car at the rear of the train was a safer place than the tool car in which to ride, and that by riding in the latter plaintiff contributed to the injuries of which he complains.

The cases of *Player v. Railway Co.*, 62 Iowa, 727, and *Doggett v. Railway Co.*, 34 Iowa, 284, are especially relied upon by appellant as supporting its claim; but this case is different from those in several important particulars. In this case the road of defendant had not been opened to the public for traffic. The plaintiff was not a passenger within the ordinary meaning of that term, nor was he a trespasser. He was rightfully on the train. Some of the evidence tends to show that he had been directed to aid the wrecking crew in replacing the derailed engine, and that he was acting in response to that direction. It is true that it was not a part of his duty to do so, but if he had been asked to render assistance in that work by competent authority, and had consented to do so by word or act, he became on that occasion, for all practical purposes, a part of the wrecking crew, and was entitled to ride in the place provided for them. The tool car was made for a caboose or way car, with platforms at the ends, doors, steps and seats, but at the time in question was used as a car in which to carry a supporting-jack, switch-rope, block, pulley, chain-hooks, bars and other articles used in connection with wrecks. It contained accommodations for a wrecking crew, and was occupied by some of them on the trip in question. The car at rear of the train, used as a way car or caboose, had been in use for some weeks, and was used for transporting employes of defendant and supplies, tools and various articles, as frogs and a wire switch-rope. At the time of the accident it contained an ice-box, a tool-box, and perhaps other articles of the kinds already named. It was an ordinary box car, which had been furnished with seats, and steps at the sides. So far as the evidence shows, it was no better adapted to the use of travelers than was the tool car, and less convenient. It is said that the latter was an old, weak

car, a mere "egg-shell;" but one of the witnesses for defendant testified that there was not much difference as to strength between it and an ordinary freight car. The evidence does not show that plaintiff was aware of any weakness in the car, nor that he was directed to ride elsewhere, although the conductor knew where he was riding. In view of all these facts, we are of the opinion that it cannot be said as a matter of law that plaintiff was negligent in riding in the tool car, nor that it was more dangerous than the way car. It is true that, if he had been in the latter when the accident occurred, he would have escaped injury, but the course pursued by plaintiff must be considered in the light of the circumstances which induced him to ride in the tool car, rather than in the light of subsequent events. The relative safety of the different cars of a train must depend, not alone upon the places they occupy with respect to the engine, but in part upon the dangers to be encountered. In case of a front-end collision or a broken bridge, the safest car might be the one furthest from the engine; while in case of a defective road bed, which is made more dangerous by each passing car, the safest car might be the one next the engine. We think it was for the jury to determine from all the evidence submitted whether or not plaintiff contributed to his injuries, and they found specially that he did not. It is not shown that he rode in a car not designed by defendant for that purpose. If he was in fact one of the wrecking crew, and, in the exercise of ordinary care and prudence, rode in the place provided for them, he was not guilty of contributory negligence. The charge, as an entirety, submitted fairly and with sufficient fulness the various issues involved, including the question of plaintiff's negligence. We cannot say that the verdict is contrary to the charge, nor that it is unsupported by the evidence. The facts of the case are unusual, and must govern its determination.

V. The special findings of the jury render it unnecessary to consider some of the assignments of error

Wiley v. Carter.

We discover no error in the case prejudicial to appellant. A rehearing was granted in this case because of some language in the former opinion in regard to the alleged negligence of plaintiff, which does not correctly represent the views of this court. We reach the same conclusion which we did on the first submission. The judgment of the superior court is **AFFIRMED.**

WILEY V. CARTER.

Fraudulent Conveyance: EXCUSED BY IMBECILITY: RECOVERY.

Plaintiff's intestate executed to defendant a promissory note without consideration, and secured by a chattel mortgage on his property, for the purpose of defrauding his creditors, but the evidence shows (GRANGER, J., not concurring) that he was of such weak mind, and so unduly influenced by defendant, that he was not chargeable in law with the ordinary consequences of such fraud. Defendant assigned the papers to M., to whom the maker paid the note in part, and he with defendant and two others as sureties made a new note to M. for the balance. This note was put in judgment, and defendant and the two other sureties paid the judgment, each paying one-third. Plaintiff's intestate paid to each of the two other sureties the amount paid by him, and took from them an assignment of any claim they might have on account of such payment. *Held* that the plaintiff was entitled to recover such amounts of defendant.

Appeal from Clarke District Court.—HON. R. C. HENRY, Judge.

FILED, MAY 29, 1889.

THE plaintiff is the administrator of the estate of B. O. Davidson, deceased. In February, 1875, B. O. Davidson made to the defendant his note for three hundred dollars, and secured the payment thereof by a chattel mortgage. The note and mortgage were afterwards transferred to one Daniel Miller. Davidson paid to Miller on the note, so that on the eleventh of July, 1877, there remained due one hundred and forty dollars, and for this amount Davidson (plaintiff's intestate), Carter (the defendant), J. F. Wells and Isaac Wiant

Wiley v. Carter.

gave to Miller their joint note. This note was afterwards put in judgment, and paid by Carter, Wells and Wiant, each paying one-third. Davidson afterwards paid to Wells and Wiant the amounts paid by them, viz., \$56.80 each, and took from them an assignment of any claim they had in consequence of the payments made by them, and it is to recover the amounts thus paid that this suit is brought. Pending this suit B. O. Davidson deceased, and the administrator is substituted as party plaintiff. The averments of the petition under which plaintiff seeks to recover are that in a suit pending against Davidson in his lifetime by the administrator of one Morrison, deceased, he settled the suit by payment, and that thereafter another suit was instituted for the same claim; that he was unable to procure testimony to prove his payment, and that to place his property beyond the reach of execution he gave to the defendant in this suit the three-hundred-dollar note and mortgage above referred to; that there was no consideration whatever for the note; and that it was given under an express understanding that it was not to be paid. It is further alleged that the plaintiff's intestate (Davidson) was an uneducated man, and had for many years prior thereto been subject to epileptic fits, and was in consequence thereof of weak mind, and easy of influence; and that the defendant, knowing this, wrongfully persuaded him to make to him the note and mortgage, and that he made the same only in consequence of such undue influence and persuasion. The defendant denies the accusation of fraud or undue influence, and avers that he gave, as a consideration for the three-hundred-dollar note, two hundred and eighty dollars in money to plaintiff's intestate. Other facts are set out, both in petition and answer, but the foregoing are all that are essential to a proper disposition of the case.

M. L. Temple, for appellant.

James Rice, for appellee.

GRANGER, J.—It will be observed that the case involves no disputed question of law, but simply questions of fact, and we accept the propositions of appellant in argument as to the facts necessary to be established, and think them correctly stated. They are: “*First*, that the making of the note for three hundred dollars, and the chattel mortgage to secure the same, was a fraudulent conveyance, for the purpose of hindering and delaying creditors, without consideration in fact; *second*, that Davidson was of weak mind, capable of being and was overreached by Carter, so far that it excused his guilt in the transaction, and rendered him incapable of being or becoming *pari delicto*.”

Aside from the parties directly interested in cases involving only questions of fact, there is no desire for extended discussions or comments by the court, and we think it not important to attempt such a discussion in this case. The abstract contains seventy-eight closely printed pages of testimony, and an attempt to fairly present even the facts in detail, as established, would consume more space and time than the effort would justify. Hence we cannot favor what we understand to be the pleasure of counsel in this respect. The testimony has been reviewed by the members of the court separately, and each has by himself noted his conclusion. A majority of the court believe from such examination that the facts as above indicated are sustained by the testimony. The writer of this opinion has a different view, and believes that, while there is much testimony favoring the conclusions of the majority, it is not of that clear or satisfactory character to justify the judgment entered below. That B. O. Davidson was a man long afflicted with epileptic convulsions is unquestioned, and that they seriously affected his mind just prior to and after the attack is equally true. The testimony is conflicting as to his mental capacity at other times, but there is much testimony—and from those most likely to know—that he was generally easily influenced. He seems to have confided much in the defendant, and from

Wiley v. Carter.

the defendant's own testimony he seems to have been disposed to assist him when he could. Both Davidson and his wife were unable to read or write. The neighbors who had known him for years are divided in their judgments as to his capacity for resisting the influence of such men as the defendant, or as to his being easily influenced.

The testimony as to the details of the transaction in giving the note and mortgage is very conflicting. If the money was ever paid to Davidson, it was paid on the public square in town, and no one else present, and before the mortgage and note were given. Quite a number of witnesses testify that Davidson admitted to them that he received the money. It seems that after the note was given there was something of a talk or rumor that the mortgage was given to cover up the property, and it was about this time that the questions were asked of Davidson, and he stated that he did receive the money. If it was true that he had given the mortgage as he claimed, then it could, of course, be expected that he would make such statements, as no truth would harmonize with the wrong. A falsehood would be its only support. Davidson's testimony is to the effect that, after the wrongful pledging of the property, he was kept in constant fear by defendant in his statements to him that they had committed a penitentiary offense, and that he was in constant fear of falling into the hands of the law, and that he was actuated by these fears in doing what he did. Davidson paid to Miller, before the one hundred and forty-dollar note was given, two hundred and fifty dollars, and he says that defendant often agreed to pay it back, and often told him he should receive back every cent, and as to much of this Davidson has considerable support in evidence, but mainly from members of his own family. Defendant denies the testimony of statements as to the penitentiary offense, or to pay back the money, and in some respects he receives support from other evidence. One S. P. Davidson, who gave testimony for the defendant which, if true, would be conclusive against the

 Milner v. The Chicago, M. & St. P. Ry. Co.

plaintiff, is so conclusively impeached that his testimony is of no avail. The assigning of the note and mortgage to Miller, and the giving of the one hundred and forty-dollar note for the balance, are questions on which considerable testimony is taken, and as to the assignment of the note Davidson claims that defendant proposed that it be done at a time when there was talk of "trying the right of property," by which we understand that the validity of the mortgage was to be tested, and the defendant thought it would aid in the concealment. Defendant's theory is that Miller wanted to borrow money, and he had none, and, understanding that Davidson would pay the note soon, he let him have the note in lieu of the money. It is a little difficult to see how the transfer of the note would aid Miller in getting the money sooner than to allow the payment to defendant, and then pass it to Miller. To say the least, the conduct of Miller is clouded with suspicion as to some of the transactions in the case, and it is urged that he was aiding defendant in his effort. As to the giving of the one hundred and forty-dollar note, there is much testimony contradicting the defendant, but he insists that he only signed as surety for Davidson. He seems to have taken a very active part in the management of the affair, and there is considerable testimony tending to show that he expected to pay the note. On the whole, the testimony is such as to satisfy a majority of the court that the facts are against the defendant, and the judgment below is

AFFIRMED.

 MILNER V. THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.

77	755
78	32
77	755
86	593

1. **Jurisdiction:** OF DISTRICT COURT AT AVOCA : CAUSE TRANSFERRED BY AGREEMENT. This action for damages was begun in Shelby county, and, by agreement of parties, it was transferred to the circuit court of Pottawattamie county, at Avoca. Afterwards, by chapter 134, Laws of 1886, the circuit courts of the state were abolished, and their powers transferred to the district courts; and it was provided that the district court of the counties should be held at other places than county seats where the circuit court was

Milner v. The Chicago, M. & St. P. Ry. Co.

authorized to be held, and should hear and determine civil causes at such places, only as the circuit court had done. Avoca is not a county seat, and the circuit court at that place was established for the transaction of business arising in that part of the county east of the west line of range forty. *Held* that the district court at Avoca had jurisdiction to hear and determine this cause,—the subject-matter being within its jurisdiction, and the jurisdiction of the parties being conferred by the agreement to transfer it to the circuit court. (*Cerro Gordo County v. Wright County*, 59 Iowa, 485, *distinguished*.)

2. **District Court at Avoca: LIMITING JURISDICTION: CONSTITUTIONALITY** It is competent for the legislature to determine that terms of the district court may be held at places other than county seats for the transaction of certain business and the trial of particular cases; and so chapter 134, Laws of 1886, in so far as it authorizes the district court to be held at Avoca, in Pottawattamie county, but limiting it to such business as the circuit court at that place was authorized to transact, is not repugnant to section 6, article 5, of the constitution, conferring general jurisdiction upon the district court.
3. ——— : **AS SUCCESSOR TO CIRCUIT COURT.** Section 17, chapter 134, Laws of 1886, providing that all laws inconsistent with that chapter were thereby repealed, did not, upon its taking effect, July 4, 1886, operate to abolish the circuit court at Avoca, because section 1 of said act provided that the circuit court should not be abolished until January 1, 1887; and, by the terms of said act, a cause pending in the circuit court at Avoca at the time the act took effect passed to the jurisdiction of the district court, which was provided to succeed the circuit court at that place.

Appeal from Pottawattamie District Court at Avoca.
HON. A. B. THORNELL, Judge.

FILED, MAY 29, 1889.

THIS is an action for damages alleged to have been sustained by the plaintiff by reason of the negligence of the defendant in the shipment of two car loads of horses from Chicago, Illinois, to Sanborn in this state. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

Wright, Baldwin & Haldane, for appellant.

Fremont Benjamin, for appellee.

ROTHROCK, J.—This action was originally commenced in the Shelby district court by the filing of a petition and the service of an original notice upon the defendant. The defendant appeared to the action on the thirteenth day of January, 1885, and by an agreement of the parties the cause was transferred to the circuit court of Pottawattamie county, at Avoca, the issues to be made in that court, and the original papers to be sent with transcript of the record. On the fifteenth day of January, 1888, the plaintiff filed in the district court at Avoca an amended and substituted petition, and on the same day the defendant filed an answer which was a general denial. On the twenty-second day of February of the same year the defendant filed a motion to dismiss the action, which motion is in these words: “Comes now the defendant in the above-entitled action and moves the court to dismiss the cause at the plaintiff’s costs, and for grounds therefor states: (1) That it is provided by chapter 198 of the Laws of the Twentieth General Assembly of the state of Iowa that the circuit court in Pottawattamie county, Iowa, at Avoca, shall have jurisdiction only of such civil causes as arise in the territory in said county east of the west line of range forty; and it appears from the plaintiff’s petition filed herein that the cause of action set forth therein did not arise in the territory of Pottawattamie county, Iowa, east of the west line of range forty. (2) That the court has no jurisdiction either of the subject-matter of this controversy or of the parties hereto, for that it appears from the amended and substituted petition filed herein, and the affidavit of John N. Baldwin, hereto attached, that the causes of action set forth in plaintiff’s amended petition arose in O’Brien county, state of Iowa. That the defendant has no residence, line of railway, property, office or agent in the territory of Pottawattamie county, Iowa, east of the west line of range forty; and that the plaintiff was at the time of the commencement of this suit, and now is, a resident of Osceola county, Iowa; and, under the act

Milner v. The Chicago, M. & St. P. Ry. Co.

of the general assembly of the state of Iowa first above referred to, no jurisdiction can be had by the court at Avoca to hear and determine this cause. (3) That this court has no jurisdiction of this cause for that the circuit court at Avoca was created and established by chapter 198 of the Laws of the Twentieth General Assembly of the state of Iowa, and that by chapter 134 of the Acts of the Twenty-first General Assembly the circuit court of the state of Iowa was abolished, and in said act it was provided that the district court of the counties should be held at other places than county seats where the circuit court was authorized to be held. That the district court of the state of Iowa is a constitutional court. That this court at Avoca has now no more lawful or legal existence, for that chapter 134 of the Acts of the Twenty-first General Assembly of the state of Iowa, in so far as it transfers the powers and jurisdiction of the district court to be held at county seats where the circuit court was authorized to be held, is contrary and repugnant to section 6 of article 5 of the constitution of the state of Iowa, and operates to create a court of partial and limited jurisdiction, and that therefore this act is unconstitutional and void. (4) That this court has no jurisdiction to hear and determine this action, for that this court has no legal existence. That there is no statute of the state of Iowa authorizing the holding of terms of the district court of Pottawattamie county, Iowa, at Avoca. (5) That this court has no jurisdiction of this cause, or to hear and determine the same, under and by virtue of the provisions of chapter 198 of the Acts of the Twentieth General Assembly, and chapter 134 of the Acts of the Twenty-first General Assembly of the state of Iowa, for that said acts are unconstitutional and void, because they operate to establish a court of partial, restricted and limited jurisdiction, and are in violation of the provisions of section 6, of article 5, of the constitution of the state of Iowa."

I. The motion was overruled, and the question presented by this appeal involves the correctness of this

 Milner v. The Chicago, M. & St. P. Ry. Co.

1. JURISDICTION: ruling. Counsel for appellant contend that
 of district the district court at Avoca had no jurisdic-
 court at tion to try and determine the action, and
 Avoca: cause that the consent of the parties to transfer
 transferred by the cause to that court did not confer jurisdiction
 agreement. thereof. The circuit court at Avoca was created by
 chapter 198 of the laws of 1884. Section 3 of that act
 provided that said court should have "original and
 exclusive jurisdiction * * * of all civil causes, includ-
 ing appeals and writs of error from inferior courts and
 other tribunals, and guardianship and probate matters,
 arising in the territory in said Pottawattamie county
 east of the west line of range forty." The object of
 this act was to divide the county of Pottawattamie for
 judicial purposes. The court to be held at Avoca had
 original and exclusive jurisdiction, and the other juris-
 diction specified within the territory named to the same
 extent, and as complete and ample as the circuit court
 held at Council Bluffs had within the territory west of
 the west line of range 40. The act above cited was a
 provision for holding the circuit court for that county at
 two places, and it prescribed the territory from which
 the judicial business at each place should be transacted.
 The act was held to be constitutional in the case of
Cooper v. Mills County, 69 Iowa, 350. This cause of
 action arose in O'Brien county; that is, the horses which
 were shipped, and for the negligent carrying of which
 damages are claimed, were delivered to the plaintiff in
 that county. But it is not claimed that the action was
 not properly commenced in Shelby county. The con-
 tention is that the circuit court at Avoca had no juris-
 diction of the action because it had no power to try and
 determine any action unless it arose in the territory in
 said county east of the west line of range 40. We
 think it is quite plain that this position cannot be sus-
 tained. This is an ordinary action for damages against
 a common carrier for failure to properly transport and
 deliver freight. The circuit court at Avoca had com-
 plete jurisdiction to try all cases of that character; that
 is, it had power to hear and determine the action. The

 Milner v. The Chicago, M. & St. P. Ry. Co.

case of *Cerro Gordo County v. Wright County*, 59 Iowa, 485, cited by counsel for appellant, is not at all in point upon that question. That was a case where it was held that consent of the parties could not give a court jurisdiction over the subject-matter of an action. It was a special proceeding, the subject-matter of which was within the exclusive jurisdiction of the circuit court. The proceeding was commenced in the circuit court, and by agreement the cause was sent to the district court of another county. That court had no jurisdiction of a proceeding of that kind, and it was held that consent would not confer jurisdiction. If the case at bar had been a criminal action, and had been transferred to the circuit court at Avoca, appellant's motion would have been well taken, because that court had no jurisdiction of the subject-matter of a criminal action. It is always important in determining the jurisdiction of a court to distinguish between jurisdiction of the subject-matter and jurisdiction of the person. There can be no question that the court had jurisdiction of the defendant in this case. The action was properly brought in Shelby county. It was competent to change the venue of the action to the circuit court of another county, no matter whether the court in that other county had original jurisdiction of the defendant or not, and if the venue could be changed by an order of the court upon a proper showing, it was competent to make the transfer by consent.

II. By chapter 134 of the Acts of the Twenty-first General Assembly, the circuit courts of the state were abolished, and it was provided in said act that the district court of the counties should be held at other places than county seats where the circuit court was authorized to be held, and that the district court should hear and determine civil causes, including probate, only as theretofore exercised at such places by the circuit court. It is claimed that this is repugnant to section 6, article 5, of the constitution, because it creates a district court to

2. DISTRICT
court at
Avoca: limit-
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tion: constitu-
tionality.

Milner v. The Chicago, M. & St. P. Ry. Co.

be held at Avoca, with limited jurisdiction. That provision of the constitution is as follows: "The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such a manner as shall be prescribed by law." It is urged that, if the legislature provides that terms of the district court shall be held at places other than county seats, the law is unconstitutional, unless the court is authorized at such terms to transact all the business and try all cases which may be tried at terms held at the county seat. We do not think this claim can be sustained. It appears to us that it was competent for the legislature to determine that terms of the court may be held at places other than the county seat for the transaction of certain business, and for the trial of particular classes of cases. The power is plainly given by the language of said section to prescribe by law the manner in which the jurisdiction shall be exercised. The case of *Laird v. Dickerson*, 40 Iowa, 670, cited by counsel for appellant, is not in point on this question.

III. This cause was tried in the court below in the month of February, 1888. Chapter 134 of the Acts of the Twenty-first General Assembly took effect on the fourth day of July, 1886. It is urged that, because by section 17 of the act all laws inconsistent therewith were repealed, the circuit court was thereby abolished; and that the act of the twentieth general assembly, providing for terms of said court at Avoca, was repealed; and that since that repeal there has never been any law enacted establishing a court at that place. There are two sufficient answers to this position: (1) Section 1 of the act of the twenty-first general assembly provided that the circuit court should not be abolished until January 1, 1887; and (2) the repealing clause did not take effect until July 4, 1886. We think the district court rightfully overruled the motion.

AFFIRMED.

WASSON V. MILLSAP *et al.*

Fraudulent Conveyance: HUSBAND TO WIFE: CONSIDERATION: WIFE'S KNOWLEDGE. A wife had conveyed land to her husband under a parol agreement, as they testified, that he would, at any time when requested by her, deed back the property, or any other property they might have. Afterwards, and, as they testified, in consideration of this agreement, he conveyed to her the property which, in this action, a creditor of the husband seeks to subject to the payment of his debt. The debt had been contracted prior to the conveyance, and it was for money collected and misappropriated by him without plaintiff's knowledge. The evidence (see opinion) shows that the husband's purpose in making the conveyance was to delay and defeat his creditors, and that the wife had knowledge of that purpose. *Held* that she could not hold the property as against plaintiff's claim.

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, Judge.

FILED, MAY 31, 1889.

ACTION by equitable proceeding wherein the plaintiff asks to subject certain real estate, the title to which is in defendant Melissa Millsap, to the payment of a judgment against the defendant Albert Millsap. Decree was entered in the district court in favor of the plaintiff, and defendants appeal.

The plaintiff claims that Albert Millsap is the real owner of the property described, and that the title thereto was made to his wife, the defendant Melissa Millsap, with intent to defraud the plaintiff and other creditors of said Albert Millsap. The defendants deny any intent to defraud, and claim that the property was conveyed to Mrs. Millsap in pursuance of a previous agreement, and for valuable consideration. It appears from the testimony, and with but little, if any, conflict, that prior to September 1, 1885, the plaintiff employed Albert Millsap to sell certain patent-right territory, and on the first day of September, 1885, Albert Millsap sold the state of Pennsylvania, receiving therefor twelve

Wasson v. Millsap.

hundred dollars; that he failed to report said sale to plaintiff, and plaintiff did not learn thereof until the latter part of March, 1886, whereupon he instituted a suit, and afterwards recovered judgment against Albert Millsap for twelve hundred dollars. The defendants were married in December, 1877, and soon thereafter Mrs. Millsap conveyed to her husband a certain quarter section of land which she owned by gift from her father, and which was afterwards sold and conveyed in connection with an adjoining eighty acres, owned by Mr. Millsap himself. The proceeds of this sale were invested in other real estate in the name of Albert Millsap, and otherwise appropriated by him. On October 6, 1885, and February 6, 1886, Mr. Millsap conveyed to his wife certain real estate, which was afterwards so exchanged as that Mrs. Millsap received the title to the property in question. Mrs. Millsap testifies that she received the conveyances from her husband in pursuance of an understanding between them at the time she deeded her farm to him. She says: "This property (her farm) was afterwards deeded to my husband for convenience, as people were making remarks about the property being in my name, and I thought it more convenient to have it changed. At the time I deeded him this land it was so done with the understanding that at any time I requested him to deed this property or any other property that we might have, be it much or little, back to me, he would do so." Mr. Millsap states the agreement in substantially the same words.

Winslow & Varnum, for appellants.

Kauffman & Guernsey and *E. S. Wishard*, for appellee.

GIVEN, C. J.—I. The controlling question in this case is whether the conveyances by Albert Millsap to his wife, by means of which she came into the title to the property in question, were with fraudulent intent to defeat the collection of the plaintiff's judgment, and, if

Wasson v. Millsap.

so, whether Mrs. Millsap participated in that intent, or had notice of such facts as would have put her upon inquiry that would have led to a knowledge of such fraudulent purpose. The right of husband and wife to contract with each other with respect to the separate property of either is well established in this state. There is no question but that, where by valid agreement either becomes the debtor of the other, the law will uphold the agreement. The rights of parties where husband or wife makes advancements to the other is clearly defined in *Hanson v. Manley*, 72 Iowa, 48. This is not a question of authority to contract, nor of advancements, but, as already stated, the question is whether the conveyances under notice were made and received with intent to defraud the plaintiff. It is claimed on behalf of defendants that these conveyances were executed and delivered in pursuance of the verbal agreement as testified to by them, and that, the agreement being executed, it is binding upon all parties. By the agreement, as stated, Albert Millsap held the title to all the property realized from the proceeds of the sale of Mrs. Millsap's farm, as well as of all other real estate to which he acquired title; thus giving him such financial standing as would be inferred from the ownership of the property in his name. Mr. Millsap owned, and, indeed, as is shown by the testimony, did receive credit on the faith of his being the owner of, the real estate standing in his name. By the agreement as stated he was liable to be divested of all his property, "be it much or little," at any time, at the instance of his wife, and without any notice whatever to his creditors that she claimed any such right against the property in his name. Mr. Millsap incurred the liability for which judgment was entered in favor of the plaintiff in September, and concealed the fact from the plaintiff, so that he did not discover it until the following March. After incurring this liability Mr. Millsap executed the deeds to his wife without other consideration than that embraced in the parol agreement. At the time of executing one of them he said to Mr. McElroy, who drew the deed, "that he

Wasson v. Millsap.

was in the patent-right business, dealing with various men, and did not know but that he might have some trouble, and he wanted to execute the deed to that property to his wife in order to be safe if he should have trouble; that he did not want to record it unless it should be necessary." This testimony was objected to on the grounds that it was a confidential communication to McElroy as an attorney. We do not think the relation of attorney and client existed. McElroy was acting simply as a scrivener in preparing the deed. Mr. Millsap's offer of one hundred and fifty dollars in satisfaction of the twelve hundred dollars, when pressed for payment, with the remark: "You had better take that because it is more than you will ever get," his declarations to McElroy, his concealment of the sale of Pennsylvania, the times at which he executed the deeds, and other circumstances appearing in the proofs, leave no doubt in our minds but that he made the conveyances with intent to defraud the plaintiff in the collection of his judgment. In view of the relation of the defendants, the kind of agreement upon which Mrs. Millsap claims the right to accept these conveyances, the time at which they were made, and all the attending circumstances, we think the inference is fully warranted that Mrs. Millsap knew of the fraudulent purpose for which the deeds were being made to her by her husband. This case is distinguishable from other cases in which this court has recognized the right of husband and wife to contract the relation of debtor and creditor. We are of the opinion that the agreement in pursuance of which these conveyances were made is void as to the creditors of Albert Millsap, and that the title to the property in question was vested in Mrs. Millsap, with intent to defraud the plaintiff in the collection of his judgment. The decree of the district court is therefore

AFFIRMED.

INDEX.

ABANDONMENT.

1. OF HOMESTEAD. See Homestead, 1, 2, 6.
2. OF RIGHT OF WAY FOR RAILROAD. See Injunction, 1.

ABSTRACT OF RECORD ON APPEAL.

See PRACTICE IN SUPREME COURT, *passim*.

ACCEPTANCE.

1. OF GOODS PURCHASED. See Sales, 5.
2. OF TRUST. See Assignment for Benefit of Creditors, 2.
3. OF OFFER FOR SALE OF LAND. See Vendor and Vendee, 4.

ACCORD AND SATISFACTION.

See GUARANTY, 2; SCHOOLS AND SCHOOL DISTRICTS, 4.

ACCOUNT.

BOOKS OF. See Evidence, 1; Estates of Decedents, 8.

ACTIONS.

1. TO PREVENT UNLAWFUL EXPENDITURE OF PUBLIC MONEY. See Counties, 2.
2. BAR OF BY FORMER JUDGMENT. See Attachment, 5; Former Adjudication, 1, 2.
3. CONDITIONS PRECEDENT TO. See Replevin, 1; Vendor and Vendee, 1.

FOR PARTICULAR ACTIONS, see appropriate titles.

AD QUOD DAMNUM.

INJUNCTION TO STOP PROCEEDINGS. See Injunction 1.

See RAILROADS, 1, 2, 4-7.

ADVERSE POSSESSION.

See HIGHWAYS, 1; WATERS, 1.

AGENCY.

1. **PAYMENT OF NOTE TO ABSCONDING AGENT: WHOSE LOSS.** P. procured C. as her agent to negotiate a loan of H., which was secured by a mortgage on land. P. paid installments of interest to C., and afterwards sold the land to J., who did the same,—he having assumed the mortgage,—and C. forwarded the interest to H. When the loan was due J. applied to C. to procure an extension of the loan for two years, and paid C. for his services. H., however, was unwilling to grant an extension. Afterwards, believing that J. was ready to pay the loan, C. paid the amount of the note with his own money, and procured a satisfaction piece, which was never recorded, but afterwards found that J. was not ready to pay, and still wanted an extension. C. then had the note and mortgage assigned in blank and sent to him, and he sold them, after due, to plaintiff, who paid full value therefor, and inserted his name in the blank assignments. J. did not know of this transfer, but supposed that H. still held the securities. At the end of the two years J. paid the amount of the loan to C., who failed to pay it to the plaintiff, but absconded. *Held* that plaintiff succeeded to all the rights of H.; that the payment to C. was not a satisfaction of the note and mortgage; and that plaintiff was entitled to foreclose it as against J. and subsequent mortgagees of the land. (Compare *Artley v. Morrison*, 73 Iowa, 132.) *Hippee v. Pond*, 235.
2. **CONTRACT FOR AGENT'S BENEFIT.** Where an agent enters into a contract binding his principal, with the full knowledge and consent of the principal, the rule which obtains where the agent contracts as such, upon consideration moving to himself, does not apply. *Miller v. Root*, 545.
3. **KNOWLEDGE OF AGENT TO BIND PRINCIPAL.** See Insurance, 5, 8, 9.
4. **ACTS AND ADMISSIONS OF AGENT TO BIND PRINCIPAL.** See Evidence, 1, 2; Insurance, 10.
5. **PRINCIPAL BOUND BY KNOWLEDGE AND ACTS OF.** See Tax Sale and Deed, 1.
6. **PURCHASE OF PRINCIPAL'S LAND AT TAX SALE.** See Tax Sale and Deed, 5.
7. **OFFICERS OF CORPORATIONS AS AGENTS.** See Corporations, 3, 4.

AGRICULTURAL COLLEGE.

LANDS OF: SALE FOR CASH. Although agricultural college lands are required to be sold on time, in order to provide a fund for the college arising from the interest on the purchase price, the college may nevertheless receive the principal, with a *bonus*, when its interests will be promoted thereby; and where it does receive the principal, it will be presumed that its officers have acted rightly for the best interests of the college. *Burtis v. Humboldt County Bank*, 103.

ALIMONY.

PETITION FOR. See Lis Pendens, 1.

AMENDMENT.

OF PLEAS. See Pleading.

ANIMALS.

1. **TRESPASSING ANIMALS : APPRAISEMENT OF DAMAGES BY TOWNSHIP TRUSTEES : JURISDICTION.** Where one who detains a trespassing animal gives the statutory notice to the person who has charge of the animal, as well as to the one having charge of the farm on which it is usually kept, it is sufficient, under sections 1543, 1544 of the Code, to give the township trustees jurisdiction to appraise the damages done by the animal, though the owner has not been notified. *Lyons v. Van Gorder*, 600.
2. ——— : **WHEN NOT TO BE TREATED AS ESTRAYS.** Where defendant took up a trespassing mare, and did not know who her owner was, but did know who had charge of her, and where she was kept, *held* that she was not an estray, within the meaning of the statute, and was not to be so treated. *Id.*
3. **SALE OF : WARRANTY OF SOUNDNESS : BREACH : DAMAGES.** See Sales, 1.

APPEAL.

(1) *To Supreme Court.*

1. **JURISDICTION : AMOUNT IN CONTROVERSY.** In an action of replevin the petition alleged that the value of the property was one hundred dollars, and that plaintiff had sustained damages by reason of its detention in the sum of twenty-five dollars. The prayer of the petition is for the delivery of the property, or for its value, if it cannot be found, and for damages and costs. *Held* that the amount in controversy was more than one hundred dollars, and that this court had jurisdiction of the appeal without a certificate from the trial judge. *Ruiter v. Plate*, 17.
2. **JURISDICTION : AMOUNT IN CONTROVERSY : CASES CONSOLIDATED.** Plaintiff brought two successive actions in justice's court against defendants, and from the judgment rendered in the first case the plaintiff appealed to the district court, and from the judgment rendered in the second case the defendants appealed. In the district court the cases were consolidated, by consent, and new pleadings were filed, the plaintiff in his substituted petition claiming \$4.62 for turkeys, and \$68.99 for corn. Defendants admitted the claim for corn, but denied liability for turkeys, and pleaded a counter-claim, which plaintiff denied. There was a verdict and judgment for plaintiff for \$47.93, from which defendant appeals to this court, but there is no certificate of the trial judge. *Held*—
 - (1) That, as to the question of jurisdiction in this court, the consolidated case should be regarded the same as if it had originated in the district court.
 - (2) That, as there could not have been a judgment under the pleadings for either party for one hundred dollars in the trial court, the amount in controversy was less than that amount, and that this court has no jurisdiction in the absence of a certificate. (Compare cases cited in opinion.) *Buckland v. Shephard*, 329.
3. **AMOUNT INVOLVED : INTEREST IN REAL ESTATE : COLLATERAL CONTROVERSIES.** An action to quiet title as against a sheriff's deed, on the ground that the property was plaintiff's homestead, "involves an interest in real estate," and therefore this court has jurisdiction of an appeal without a certificate, regardless of the amount involved; and controversies between the appellant and other defendants being incident to the main issue, must follow the appeal, regardless of the amount involved in such controversies. *Jones v. Blumenstein*, 361.

4. **AMOUNT INVOLVED.** In an action to subject real estate to the payment of a fine of one hundred dollars and costs of \$6.70, adjudged against a tenant of the real estate for the unlawful sale of liquors therein, the amount involved is \$106.70, and an appeal lies to this court from a judgment therein without a certificate of the trial judge. The statute makes the property in such cases liable for the costs as well as for the fine. *State v. McCulloch*, 450.
5. **LESS THAN \$100 : CERTIFICATE OF TRIAL JUDGE : SUFFICIENCY.** In this appeal, involving less than one hundred dollars, the certificate of the trial judge recited the ultimate facts which the evidence established, and upon which the certified questions of law depend, and did not require this court to determine the effect of the evidence. *Held* that it was sufficient to give this court jurisdiction, as against the objection that it showed that there was a conflict in the evidence, and was a certificate of the conclusions of the court as to the facts found. (See opinion for certificate.) *Wineland v. Jones*, 401.
6. **LESS THAN \$100 : WHEN CERTIFICATE MUST BE SIGNED.** Where a motion for a new trial was ruled upon at 10 o'clock a. m., and a request was then made for a certificate for an appeal, but the certificate was not signed by the judge until 8 o'clock p. m. of the same day, *held* that it was not too late. *Courtright v. Singer Manuf. Co.*, 817.
7. **FROM "DECISION" OF COURT : NOTICE MUST BE SPECIFIC.** An appeal to this court may be general,—from all judgments and decisions of the case from which appeals may be taken, or it may be specific—from a particular judgment or decision ; and the notice of appeal must state from what the appeal is taken,—whether from the whole case, or some specific part thereof, naming it. And in this case, where the notice stated that the appeal was taken from "the decision" of the district court at a given term, *held* that the word "decision" meant an adjudication other than a final decision ; and since there were many such decisions, it is impossible to say which one was meant, and therefore the appeal must be dismissed. *Weiser v. Day Bros.*, 25.
8. **NO NOTICE TO INTERESTED CO-PARTY : DISMISSAL.** In an action by the insured upon a policy of fire insurance, a mortgagee to whom the loss, if any, was payable as her interest might appear, failing to join as plaintiff, was brought in as a defendant, under Code, sections 2548, 2551. From a judgment against the defendant company it appeals to this court, but fails to serve notice of the appeal on its co-defendant, the mortgagee, as required by section 8174 of the Code, and she does not join in the appeal. *Held* that the appeal must be dismissed. (See *Hunt v. Hawley*, 70 Iowa, 183 ; *Moore v. Held*, 78 Iowa, 538.) *Day v. Hawkeye Ins. Co.*, 848.
9. **ERRORS WHICH SHOULD BE CORRECTED BELOW.** Mere defects in an original notice properly served should be corrected by motion of the defendant in the court below, and do not warrant the defendant in making default and then appealing to this court. (See Code, sec. 8168.) *Gray v. Wolf*, 680.
10. **FROM VERDICT WITHOUT JUDGMENT.** This court has no jurisdiction to entertain an appeal from a verdict on which the record fails to show that a judgment has been entered. (Compare *Shannon v. Scott*, 40 Iowa, 629.) *Jones v. Givens*, 173.
11. **ERROR IN APPELLANT'S FAVOR.** An appellant cannot predicate error on the fact that the judgment from which he appeals is less than the verdict of the jury against him. *Deere v. Wolf*, 115.

12. JURISDICTION : CONSTRUCTION OF WILL. This court has no original jurisdiction to construe a will, and it cannot, upon appeal, pass upon a point in the construction of a will which the lower court refused to consider on the ground that it was not necessary. *Bills v. Bills*, 179.

13. FROM JUDGMENT AGAINST PLAINTIFF IN ATTACHMENT : DISSOLUTION. See Attachment, 9.

(2) *From Order Establishing Highway.*

14. NOTICE : ON WHOM SERVED : JURISDICTION. See Highways, 2.

(3) *From Justices' Courts.*

See JUSTICES AND THEIR COURTS, 1.

(4) *From Orders of Supervisors in Regard to Levees.*

See LEVEES, 2.

APPEARANCE

See DEPOSITIONS, 1 ; JUDGMENT, 1.

ARREST.

OF EXECUTION DEBTOR. See Execution, 1.

ASSAULT WITH INTENT TO RAPE.

See CRIMINAL LAW, 26.

ASSESSMENT.

1. OF STOCKHOLDER ON CORPORATION STOCK. See Corporations, 1.

2. OF LANDS TO PAY FOR LEVEES. See Levees.

ASSIGNMENT.

1. TO ATTORNEY OF JUDGMENT AGAINST CLIENT : VALIDITY. See Attorney at Law, 1.

2. OF PART OF NOTES SECURED BY MORTGAGE. See Mortgages, 11.

3. OF INTEREST IN LAND BY PLAINTIFF IN PARTITION. See Partition, 4.

4. OF PROPERTY TO TRUSTEE FOR HIS BENEFIT AND OTHERS : DUTY OF TRUSTEE. See Trusts, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. VOID BECAUSE CONDITIONAL. An assignment for benefit of creditors contained the following clause : "In case that any of my creditors who file claims against my estate, and receive a dividend therefrom, do not receive the full amount due them, then the receipt of any just *pro rata* share of the amount due them shall be deemed a satisfaction of the demand, and so by them accepted." *Held* that this clause made the assignment conditional, and therefore void, and that the court rightly so held in a garnishment proceeding against the assignee by a creditor who repudiated the assignment, and sought to reach the property in the hands of the assignee for the full satisfaction of his claim. (See cases cited in opinion.) *Sperry v. Gallaher*, 107.

2. **ACCEPTANCE OF TRUST AND DELIVERY OF DEED.** Before the deed of assignment herein was executed, the person named as assignee had orally agreed with the assignor's brother to act as assignee in case an assignment should be made. The deed was afterwards made and placed in the hands of K., whom the assignor and his brother had requested to act for the assignee, who was absent. K. filed the deed for record, and afterwards an attachment was levied on the property. *Held* that the deed was delivered and the trust accepted prior to the attachment. (Compare *American v. Frank*, 62 Iowa, 202.) *Singer v. Armstrong*, 397.
3. **VALIDITY : EVIDENCE.** Where the claim was made that an assignment for the benefit of creditors was void because certain property was withheld from the assignment, evidence tending to show that such property did not belong to the assignor was properly admitted. *Id.*
4. **EVIDENCE.** The acceptance of an assignment having been shown by oral testimony, the assignment itself was admissible in evidence. *Id.*

ASSIGNMENT OF ERRORS.

See PRACTICE IN SUPREME COURT, 27.

ATTACHMENT.

1. **WRONGFUL : SALE OF PROPERTY UNDER : DAMAGES.** When a debtor's goods are wrongfully seized and sold under an attachment, but the proceeds are applied to the payment of his debts, the measure of his damages for the wrongful attachment is not the value of the goods when seized, but the difference between that value and the amount realized upon their sale. *Empire Mill Co. v. Lovell*, 100.
2. **RELEASE OF PROPERTY ON AGREEMENT : LIABILITY OF OFFICER.** Where the plaintiff in an attachment suit and the defendant therein agree upon terms of settlement, and thereupon direct the officer to release the attached property, the officer is not afterwards made liable for so doing by the defendant's failure to comply with the terms of the agreement of settlement. *Melhop v. Seaton*, 151.
3. **THE SAME : EVIDENCE.** In such case, all evidence tending to show the agreement discharging the property was rightly admitted in behalf of the officer, and was not vulnerable to the objection that it contradicted his endorsement on the writ. *Id.*
4. **THE SAME : ESTOPPEL OF OFFICER BY JUDGMENT.** The judgment in the attachment case directing the property to be sold did not estop the officer from showing that he released it upon the agreement; for he was not a party to that case, and was not bound by the judgment. *Id.*
5. **JUDGMENT BY DEFAULT : ACTION ON BOND FOR WRONGFUL SUING OUT.** A judgment by default for plaintiff in an attachment case, upon personal notice to defendant, is not necessarily a bar to a subsequent action on the attachment bond for the wrongful suing out of the writ. It depends upon the grounds upon which it is claimed the attachment was wrongful. *Courtright v. Singer Manuf. Co.*, 317.

6. **ABSCONDING DEBTOR SERVED BY PUBLICATION : PERSONAL JUDGMENT VOID.** A personal judgment rendered against an absconding and non-resident debtor, served by publication only, in an attachment proceeding, is absolutely void, and a sale of real estate thereunder is unauthorized and illegal, and confers no title upon the purchaser or his grantees. (See *Lutz v. Kelly*, 47 Iowa, 307; *Smith v. Griffin*, 59 Iowa, 409.) *Cassidy v. Woodward*, 354.
7. **THE SAME : VALIDATION OF SALE BY RECITAL IN SHERIFF'S DEED.** In such case, a recital in the sheriff's deed that the sale was made pursuant to "the written notice of the defendant that he elected to have said real estate sold subject to redemption," did not have the effect to validate the judgment and sale. *Id.*
8. **THE SAME : SUBSEQUENT NUNC PRO TUNC JUDGMENT IN REM : NOTICE BY PUBLICATION : PARTIES.** Twelve years after such void judgment was rendered, and after defendant therein had conveyed the land attempted to be sold thereunder, the attachment plaintiff, who had bid in the land, began an action upon notice by publication against the attachment defendant, and procured a *nunc pro tunc* judgment *in rem* against the land. *Held* that this was of no avail as against said defendant's grantee of the land, because (1) The defendant therein had no longer any interest in the land, and the notice by publication was not authorized, and gave the court no jurisdiction (Code, sec. 2618); (2) The proceeding was not for the purpose of correcting a mistake in a judgment, but to substitute a judgment *in rem* in the place of a personal judgment long before rendered and approved and signed by the judge, and was therefore without warrant; (3) The grantee was not made a party to such a proceeding, and was therefore not bound thereby. *Id.*
9. **APPEAL : DISSOLUTION BY OPERATION OF LAW.** Where there is judgment against the plaintiff in an attachment case, and he fails to appeal within two days thereafter, the attachment is dissolved by operation of law (Code, secs. 3019, 3020); and where the cause is remanded for a new trial, which results in a judgment for plaintiff, it is error to order a special execution for the sale of the attached property. *McCormick Harv. Mach. Co. v. Jacobson*, 582.
10. **GROUND FOR : PROPERTY OBTAINED UNDER FALSE PRETENSES.** Defendants induced plaintiff to purchase land worth \$640 for the sum of \$2240, by falsely representing to him that the land was worth the larger amount,—plaintiff never having seen the land. Plaintiff brought this action to recover the difference between said sums as his damages for the false representations. *Held* that such action was well grounded (see cases cited in opinion), and that an attachment was properly issued upon a petition stating such facts, under the twelfth subdivision of section 2951 of the Code, providing that an attachment may issue where "the debt is due for property obtained under false pretenses." *Stanhope v. Swafford*, 594.
11. **SERVICE BY OFFICER DE FACTO.** The service of an attachment by an officer *de facto* is valid as to the rights of other persons. *Stickney v. Stickney*, 699.
12. **LEVY : PRIOR MORTGAGE.** See Chattel Mortgages, 5.
13. **IN JUSTICES' COURTS.** See Justices and their Courts, 2.

ATTORNEYS AT LAW.

1. **BREACH OF TRUST : PURCHASING JUDGMENT AGAINST CLIENT.** An attorney at law will not be allowed to profit by purchasing, against the interest of his client, the very judgment which he was

employed to defeat. But where the clients were husband and wife, and the husband's land was about to be sold to satisfy the judgment against him, and the attorney, by an agreement with the husband, who represented his wife also, took an assignment of the judgment for a sum paid by him, much less than the amount of the judgment, and ordered the execution returned, with the understanding that he should hold the judgment as security for the money so advanced by him, and that it should be a first lien on the property, and that an action by the wife against the husband and the property on a claim for a mechanic's lien, which should be superior to the judgment, should be dismissed, *held* that such assignment was valid, and that, upon a refusal of his clients to repay the money, he was authorized to sue out execution on the judgment and buy in the property on which it was a lien, and that his title thus obtained was superior to the title obtained by the wife upon a foreclosure of and sale under her mechanic's lien, which was prosecuted to judgment notwithstanding the agreement,—neither the attorney nor his assignor being a party thereto. *Baker v. First Nat. Bank of Davenport*, 615.

2. APPEARANCE BY. See Depositions, 1; Judgment, 1.
3. PRESUMPTION IN FAVOR OF LEGAL CONDUCT OF. See Judgment, 1.
4. NEGLIGENCE : IMPUTED TO CLIENT. See Judgment, 2.
5. AGREEMENTS OF : EVIDENCE. See Practice in Supreme Court, 81.

ATTORNEY'S FEES.

1. ON NOTE IN SUIT BEFORE DUE. Where the maker of a note, before it was due, brought an action to enjoin the foreclosure of a chattel mortgage given to secure it, and she was entitled to a set-off against the note, and could not pay it at maturity without abandoning her right to the set-off, she could not be said to be in default, and, in rendering judgment against her for the balance due on the note, the holder was not entitled to recover the attorney's fees provided in the note in case suit was brought to collect it. *Otcheck v. Hostetter*, 509.
2. TAXATION : AFFIDAVIT. Chapter 185, Laws of 1880, requiring an affidavit to be filed before an attorney's fee is taxed, does not relate to contracts made before it took effect. *McCormick Harv. Mach. Co. v. Jacobson*, 582.
3. FOR DEFENDING AGAINST WRONGFUL INJUNCTION. See Injunction, 2.
4. FOR PROSECUTING VIOLATIONS OF PROHIBITORY LIQUOR LAW. See Intoxicating Liquors, 9.

BANKS AND BANKING.

APPLICATION OF DEPOSIT ON NOTE OF DEPOSITOR : INSTRUCTION. Plaintiffs, who were bankers, sued defendant, a depositor, for an amount alleged to be due on an overdraft, and they alleged, among other things, that they applied a portion of defendant's deposit, at his request, in payment of a balance due on his note held by them. On this issue the court so instructed the jury that they would infer that plaintiffs had no right to apply the deposit on the note unless defendant had so requested it, as alleged in plaintiffs' petition. *Held* error, because they had such right without any request on his part, and the allegation of a request was superfluous and not necessary to be proved. *Knapp v. Cowell*, 528.

BILLS AND NOTES.

See PROMISSORY NOTES.

BILLS OF EXCEPTIONS.

1. **SKELETON : EVIDENCE TO BE INSERTED MUST BE CLEARLY IDENTIFIED.** A skeleton bill of exceptions in this case directed the clerk to insert the evidence as shown by the translation of the short-hand reporter's notes on file in the case. The translation which the clerk inserted in no way showed, by caption or certificate, to what cause it belonged, but, after the paper had been folded for filing, the title of this case was written on the back, in a hand which was neither that of the reporter nor of the clerk. *Held* that this was not sufficiently identified to authorize the clerk to insert it, and that the evidence should be stricken from the record in this court. *Joy v. Bitzer*, 73.
2. **TIME OF FILING : EXTENSION BY AGREEMENT.** An agreement for the submission of a cause, and for a decision in vacation as of the last day of the term, does not have the effect to extend the time for filing exceptions to instructions; and, where such exceptions are not filed within the three days prescribed by section 2789 of the Code, they will be stricken from the record in this court. (See cases cited in opinion.) *Edwards v. Cosgro*, 428.

BOARD OF EQUALIZATION.

JURISDICTION OF. See Taxation, 2.

BOARD OF SUPERVISORS.

1. **POWER TO BRIDGE NAVIGABLE LAKES.** See Counties, 8.
2. **EQUALIZATION OF TAXES BY.** See Taxation, 1.
3. **JURISDICTION OF IN REGARD TO LEVEES.** See Constitutional Law, 1.
4. **NO POWER TO REMIT FINES.** See Criminal Law, 22.

BONDS.

1. **ATTACHMENT BOND : ACTION ON.** See Attachment, 5.
2. **BOND OF COUNTY TREASURER : LIABILITY ON : WHO MAY SUE.** See County Treasurer, 1, 2.
3. **INJUNCTION BOND : ACTION ON FOR ATTORNEY FEES.** See Injunction, 2.

BRIDGES.

OVER NAVIGABLE LAKES. See Counties, 2, 8.

BURDEN OF PROOF.

See INSTRUCTIONS, 20, 21 ; MORTGAGES, 4 ; PLEADING, 2, 11 ; PROMISSORY NOTES, 1, 2 ; TAX SALE AND DEED, 5.

CARRIERS.

EJECTION OF PASSENGER. See Railroads, 29.

CASES IN THE IOWA REPORTS CITED, FOLLOWED, ETC.

[The figures immediately following the title of the case show the volume and page of the Iowa Reports where the case is found; the words in Roman type indicate the subject under consideration; and the figures following refer to the page in this volume where the citation is made.]

A

- Adams v. Burdick*, 68, 666. Tax sale: Notice to redeem. 695.
Allen v. Bryson, 67, 595. Parol to affect writing. 606.
Alsip v. Hard, 88, 697. Appeal: Amount involved. 881.
American v. Frank, 62, 202. Deed of assignment: Delivery. 898, 899.
Armstrong v. Killen, 70, 52. Appeal: Abstract not denied. 75.
Arthur v. Craig, 48, 264. Conditional pardon by governor. 274.
Artley v. Morrison, 78, 182. Payment to absconding agent: Whose loss. 237, 239.
Arts v. Culbertson, 78, 14. Short-hand notes of evidence: Translation to be filed when. 124, 380.
Auchampaugh v. Schmidt, 72, 656. Competency of witness: Case overruled. 17.

B

- Bailey v. Anderson*, 61, 749. Instructions: Exceptions to: When to be filed. 172.
Baker v. Johnson County, 87, 186. Contract: Proposal and acceptance. 814.
Ball v. Railway Co., 71, 806. Right of way: Damages: What land considered. 410.
Bankhead v. Brown 25, 540. Town council: Establishment of streets. 459.
Barke v. Early, 72, 273. Tax sale: For taxes not carried forward. 487.
Barnes v. Marshall County, 56, 22. Railroad aid tax: Failure of county treasurer to pay: Who liable. 537, 539.
Barr v. Cannon, 69, 20. Mortgage of crops: Description. 369.
Beeds v. Association, 76, 129. Evidence: Papers in possession of adversary. 789.
Beecher v. Clay County, 52, 140. Illegal taxes: *Mandamus* to refund: Limitation of action. 473.
Bells v. Foutch, 21, 182. Navigable stream: Obstruction: Right of private citizen. 640.
Berry v. Hayden, 7, 473. Assignment for creditors: Validity. 109.
Boardman v. Beckwith, 18, 292. Void taxation: Legalizing act: constitutionality. 520.
Bonham v. Insurance Co., 25, 328. Special interrogatories. 298.
Bosch v. Railway Co., 44, 402. Damages: Proximate cause: Law or fact. 325.
Bradley v. Jefferson County, 4 G. Greene 800. Deputy county clerk: Employment: Compensation. 346.
Brandt v. Foster, 5, 287. Breach of warranty: Eviction. 437.
Brentner v. Railway Co., 68, 530. Railroads: Stock-killing: Interest on damages before verdict. 669.
Brooks v. Polk County, 52, 460. Taxation of land in cities. 555.

- Brown v. Mallory*, 26, 469. Practice: Wrong forum: Remedy. 161.
Brundige v. Maloney, 52, 218. Tax sale: Part of tract for whole tax: Description. 695.
Bunce v. Bunce, 59, 533. Judgment on defective original notice. 639.
Bunce v. West, 62, 80. Mortgagees in possession: Rents and profits. 68.
Burroughs v. McLain, 37, 189. Claims against estates: Limitation of action. 508.
Bush v. Nichols, 77, 171 (*ante*). Bill of exceptions: Time for filing. 429.
Butler v. Board, 46, 326. Railroad aid tax: Collection: Liability. 472, 539.
Byres v. Rodabaugh, 17, 53. Practice: Wrong forum: Remedy. 161.

C

- Caffel v. Hale*, 49, 53. Fraudulent conveyance: Evidence. 207.
Callanan v. County of Madison, 45, 531. Illegal taxes: Recovery: Limitation. 472.
Carroll County v. Railroad Land Co., 53, 685. Injunction: Counsel fees for defending. 303.
Carthan v. Lang, 69, 384. Officers: Unlawful acts: Injunction. 640.
Casady v. Woodbury County, 13, 113. Contract: Part legal, part illegal. 627.
Cash v. Hinkle, 36, 624. Parol to affect writing. 607.
Cassady v. Cavenor, 37, 300. Joint tortfeasors: Liability. 580.
Central Iowa Ry. Co. v. Railway Co., 57, 249. Right of way: Condemnation: Injunction: Remedy at law. 234.
Cerro Gordo County v. Wright County, 59, 485; Jurisdiction by consent, 760.
Chance v. Temple, 1, 201. Action against state. 641.
Chillon v. Railway Co., 72, 690. Appeal: Less than \$100: Certificate. 403.
Christy v. Whitmore, 67, 60. Township trustees: Cemeteries. 287.
City of Centerville v. Drake, 58, 564. Appeal: Amount involved. 331, 332.
City of Marshalltown v. Forney, 61, 573. Vacation of street: *Ultra vires*. 459.
Clapp v. Trowbridge, 74, 550. Chattel mortgage: Insufficient description: Actual notice. 309, 369.
Clark v. Ralls, 71, 189. Special interrogatories: Submission to counsel. 307.
Clark v. Reiniger, 66, 507. Instructions: Exceptions to: When to be filed. 172.
Clute v. Frasier, 58, 271. Parol to reform writing. 166, 323.
Coakley v. McCarty, 34, 105. Pleading: Error waived by answering. 51.
Collins v. Hills, 77, 181 (*ante*). Intoxicating liquors: Sale in original packages. 188.
Conyngham v. Smith, 16, 471. Practice: Wrong forum: Remedy. 161.
Cook v. Lorell, 11, 81. Estates of decedents: Credits: Set-off. 493.

Cooper v. Mills County, 69, 350. Circuit court at Avoca: Constitutionality, 759.
Cornell College v. Iowa County, 32, 520. Officers: Unlawful acts: Injunction. 640..
Cornett v. Insurance Co., 67, 388. Insurance: Proofs of loss: Waiver. 377.
Cottle v. Cole, 20, 481. Parties plaintiff: Trustee without interest. 357..
County of Buena Vista v. Railway Co., 49, 657. New trial: Failure of counsel, 839.
Cowan v. Musgrove, 73, 384. Compensation to member of family for services. 291.
Cox v. Railway Co., 76, 306. Right of Way: Damages: What land considered. 410.
Crane v. Guthrie, 47, 545. Administrator's right to unaccrued rents. 491.
Crawford v. Ginn, 35, 550. Accrued rents go to administrator. 490.
Crawford v. Taylor, 42, 280. Judgment lien: Duration: Right to redeem under. 647.
Cross v. Garrett, 35, 486. Argument to jury: Reading affidavit for continuance. 685.
Cummings v. Long, 16, 41. Judgment not indexed: Notice. 386.
Cummings v. Torey, 39, 195. Chattel mortgage: Insufficient description. Actual notice. 370.

D

Darling v. Boesch, 67, 702. *Certiorari*: When proper remedy. 651.
Davies v. Huebner, 45, 574. Highway: Forfeiture by non-user. 254.
Davis v. Kelley, 14, 523. Homestead: Abandonment: Evidence. 368.
Day v. Griffith, 15, 104. Mortgage: Delivery. 441.
Day v. Insurance Co., 75, 694. Answer: Denial by implication of law. 586.
Day v. Lown, 51, 364. Parol to vary writing: Fraud, 86; Parol to show real consideration for deed. 168.
Deere v. Nelson, 73, 187. Mortgage: Delivery. 441.
Deering v. Irving, 76, 519. Appeal: Bill of exceptions filed too late. 429.
Des Moines & M. Ry. Co. v. Lowry, 51, 486. Railroad aid tax: Treasurer is trustee, 472; County not liable. 539.
Doggett v. Railroad Co., 34, 284. Injury to passenger riding on wrong car. 749.
Dougherty v. McManus, 36, 657. Defective original notice: Judgment not void. 632.
Dows v. Dale, 74, 109. Tax sale: For taxes not carried forward. 437.
Drake v. Jordan, 73, 707. Liquor nuisance: Chap. 66, Laws of 1886: Attorney's fees: Application to pending suits. 533.
Dreher v. I. S. W. Ry. Co., 59, 601. Special interrogatories. 36.
Dubuque Wood, etc., Ass'n, v. City and County of Dubuque, 30, 176. Damages: Proximate cause: Question of law or fact. 325.

E

Early v. Burt, 68, 716. Mechanic's lien: Prior encumbrance: Decree. 349.
Eikenberry v. Edwards, 67, 619. Contempt: Right to jury trial. 294.
Eladrede v. Bell, 64, 128. Estates of decedents: Credits: Set-off. 493.

Engert v. White, 59, 464. Mortgage of crops: Description. 369.
Erwell v. Greenwood, 26, 377. Water: Pollution by upper owner. 579.

F

Fallon v. Dist. Twp. of Johnson, 51, 206. Certificate for appeal: When it must be signed. 318.
Ferris v. Anderson, 72, 420. Appeal: Abstract not denied. 75.
First Nat. Bank v. Thurman, 69, 693. Breach of contract: Remote damages. 574, 575.
Flannigan v. Althouse, 56, 513. Good-faith purchasers: Who are not. 705.
Foley v. Railway Co., 64, 644. Injury by fellow-servant: Master's liability. 432.
Fort Madison Lumber Co. v. Batavian Bank, 71, 270. Stockholders: Liability to assessments. 34.
Foteaux v. Lepage, 6, 130. Administrator's right to unaccrued rents. 491.
Fowler v. Town of Strawberry Hill, 74, 645. Abstract served too late: Effect. 127.
Franklin v. Tuckerman, 68, 572. Contract to convey: Specific performance. 114.
Fulton v. City of Davenport, 17, 404. Taxation of land in cities. 555.
Funk v. Cresswell, 5, 62. Covenant of warranty: Breach: Eviction. 437.
Fyffe v. Beers, 18, 4. Homestead: Abandonment: Evidence. 366.

G

Gardner v. Early, 69, 43. Tax sale: For taxes not carried forward. 437.
Gatch v. City of Des Moines, 63, 718. Special taxation: Right of tax-payer to notice. 521.
Gebhard v. Sattler, 40, 152. Fraudulent conveyance: Notice of: Statute of limitations, 241.
Gelpke v. Blake, 15, 339. Parol to reform writing. 166, 328.
George v. Swafford, 75, 491. Setting aside verdict: Discretion. 60.
Gibbs v. McFadden, 39, 371. Wrong forum: Remedy. 161.
Gilmore v. Ferguson, 28, 422. Appeal: From right judgment based on wrong reason. 591.
Goodenow v. Barnes, 40, 561. Contract: Proposal and acceptance. 314.
Goodnow v. Litchfield, 63, 275. Statute of limitations: Delayed by pending suit. 474.
Goodnow v. Stryker, 62, 221. Statute of limitations: Delayed by pending suit. 474.
Gower v. Winchester, 33, 303. Judgment lien: Duration of: Redemption. 647.
Graessle v. Carpenter, 70, 166. Trespass to real estate: Measure of damages. 52.
Gray v. Meyers, 45, 160. Administrator's right to unaccrued rents. 491.
Greenough v. Sheldon, 9, 506. Evidence. Secondary: Of papers in possession of adversary. 739.

H

Haines v. Lewis, 54, 301. Contract: Illegal consideration. 627.
Hakes v. Myrick, 69, 189. Evidence: Admissions of agent. 433.
Hale v. Walker, 31, 344. Stockholders: Liability to assessments. 34.

Hall v. Carter, 74, 368. Remark of court in presence of jury: Prejudice. 588.
Hamilton v. City of Dubuque, 50, 218. Illegal taxes: Recovery: Limitation. 472.
Hamsmith v. Esby, 19, 444. Sheriff's sale: Caveat emptor. 366.
Handelun v. Railway Co., 72, 709. Damages: Proximate cause: Law or fact. 825.
Hanners v. McClelland, 74, 328. Argument to jury: Reading motion for continuance. 635.
Hanson v. Manley, 72, 48. Husband and wife: Conveyance: Consideration. 764.
Harger v. Spofford, 44, 369. Attachment: Appeal: Dissolution by delay. 585.
Harrison v. Charlton, 42, 578. Exceptions to instruction: When taken. 172.
Harrison v. Kramer, 8, 543. Fraudulent conveyance: Subsequent creditors. 208.
Hartman v. City of Muscatine, 70, 511. Injury on sidewalk: Contributory negligence. 94.
Hendershott v. Ping, 24, 184. Lien of judgment: Duration. 648.
Henkle v. Town of Keota, 68, 834. Board of equalization: Raising assessment: Notice. 497.
Hervey v. Savery, 48, 818. Deed: Reformation: Evidence. 828.
Hill v. Holloway, 52, 678. Bill of exceptions: Identification of evidence. 77.
Hintrager v. Richter, 76, 406. Statute of limitations: Delayed by pending suit. 475.
Hirshhorn v. Stewart, 49, 418. Facts admitted: Question of law. 408.
Hodgin v. Toler, 70, 25. Administrator's right to unaccrued rents. 491.
Holzinger v. Edwards, 51, 384. Sheriff's sale: Caveat emptor. 366.
Hooper v. Bank, 72, 280. Tax sale: For taxes not carried forward. 487.
Hospers v. Wyatt, 63, 265. Officers: Unlawful acts: Injunction. 640.
Howe v. Thayer, 49, 154. Judgment: Wrong name: Notice. 384, 386.
Hudson v. Railway Co., 59, 582. Appeal: Less than \$100: Certificate. 403.
Hunt v. Hawley, 70, 183. Appeal: Who to have notice. 345.
Hunter v. City of Des Moines, 74, 215. Appeal: Abstract not denied. 75.
Hutton v. Maines, 68, 650. Parol to affect writing. 607.

I

Iowa R. R. Land Co. v. Soper, 39, 112. Void taxation: Legalizing act. Constitutionality. 520.

J

Jack v. Naber, 15, 450. Deed: Reformation: Evidence. 828.
James v. Brown, 48, 568. Tenants in common: Recovery of rent by one of another. 78.
Jamison v. Perry, 38, 14. Appeal: From right judgment based on wrong reason. 591.
Johnston v. Johnston, 36, 608. Claims against estates: Limitation of action. 508.
Jones v. Brandt, 59, 332. Conveyance to wife: Validity. 206.

Jones v. Clark, 37, 391. Replevin: Demand as a condition. 19.
Jordan v. Walker, 52, 647. Forfeible detainer: Trial of title: What is not. 208.
Jordon v. Hayne, 36, 9. Certiorari: When proper remedy. 651.
Judd v. Mosely, 80, 426. Partition: Non-resident minors: Notice by publication. 341.

K

Kavaller v. Machula, 77, 121 (ante). Appeal: Evidence: Translation filed too late. 127.
Kearney v. Ferguson, 50, 72. Appeal: Abstract not denied. 22.
Kendall v. City of Albia, 72, 241. Injury on sidewalk: Contributory negligence. 95.
Kess v. Chicago & N. W. Ry. Co., 80, 78. Railroads: Negligent fires: Effect of contributory negligence. 656.
Kinsell v. Billings, 35, 156. Estates of decedents: Descent of real estate. 489.
Kline v. Kansas City, St. J. & C. B. Ry. Co., 50, 656. Error waived by answering. 51.
Knadler v. Sharp, 36, 232. Parties plaintiff: Mere trustees. 357.
Knapp v. Railway Co., 71, 41. Damages: Proximate cause: Law or fact. 325.
Koenig v. Schmitz, 71, 176. Mortgages filed at same time. 56, 6685.
Krebs v. Minneapolis & St. L. Ry. Co., 64, 670. Railroads: Killing stock: Wilful act of owner. 31.

L

Laird v. Dickerson, 40, 670. Jurisdiction of district court. 761.
Laird v. Kilbourne, 70, 83. Fraudulent conveyance: Statute of limitations: Notice. 240, 375.
Lamb v. Insurance Co., 70, 240. Insurance: False statement: Knowledge of agent. 177.
Lance v. Railway Co., 57, 636. Right of way: Damages: Danger from fire. 411.
Langworthy v. McKelvey, 25, 49. Injunction: Counsel fees for defending. 302.
Lanning v. Chicago, B. & Q. Ry. Co., 68, 205. Railroads: Negligent fires: Evidence. 189.
Likes v. Baer, 8, 370. Sale of animals: Breach of warranty: Damages. 80.
Linscott v. Lamart, 46, 815. Mortgage: Merger in deed. 66.
Long v. Smith, 62, 331. Tax sale: Right of redemption: When cut off. 714.
Loughran v. City of Des Moines, 72, 332. Nuisance to realty: Damages. 52, 581, 582.
Lucas v. Barrell, 1 G. Greene. 510. Evidence: Statements of agent. 483.
Lutz v. Kelley, 47, 307. Notice by publication: Personal judgment void. 359.
Lyman v. Cassford, 15, 229. Fraudulent conveyance: Subsequent creditors. 208.

M

Madison v. Spitznogle, 58, 369. Appeal: Amount involved. 331.
Manix v. Malony, 7, 81. New trial: Newly-discovered evidence. 560.

Marks v. Mill Co., 43, 147. Parol to affect writing. 607.
McAfee v. Busby, 69, 328. Sale: Possession as against vendor's creditors. 143.
McCormack v. Cook, 11, 267. Claims against estates: Limitation of action. 508.
McCreary v. Skinner, 75, 411. Fraud: Degree of proof. 729.
McDaniels v. Whitney, 33, 60. Specific performance: Degree of evidence. 314.
McDole v. Purdy, 23, 277. False representations in exchange of land: Damages. 573, 574; Debt for damages. 596.
McKay v. Thorington, 15, 29. Appeal: From order for new trial. 12.
McKinley v. Chicago & N. W. Ry. Co., 44, 315. Mental suffering: Damages. 58.
McLain v. Calkins, 77, 468 (ante). Forcible entry and detainer: Notice to quit: Time. 630.
McLane v. Bonn, 70, 752. Liquor Nuisance: Chap. 66, Laws of 1886: Attorney's fees: Application to pending suits. 533.
McLaury v. City of McGregor, 54, 717. Injury on sidewalk: Contributory negligence, 94; Facts admitted: Question of law. 403.
McPherrin v. Jennings, 66, 622. Admissions of agent to bind principal. 153.
Merrill v. Bowe, 69, 653. Appeal: Translation of evidence: Filed too late. 380.
Mershon v. Insurance Co., 34, 87. Action on policy by mortgagee. 87.
Metz v. Soule, 40, 233. Joint tort-feasors: Liability. 580.
Minneapolis & St. L. Ry. Co. v. Becket, 75, 183. Railroad aid tax: Failure of county treasurer to pay: Who liable. 537.
Moore v. Held, 73, 533. Appeal: Parties: Who to have notice. 345.
Morris v. Sargent, 18, 90. Homestead: Abandonment: Evidence. 366.
Morrison v. Springer, 15, 304. Statutes: Presumed to be constitutional. 523.
Morrow v. Railway Co., 61, 487. New Trial: Newly-discovered evidence. 560.
Mudge v. Agnew, 56, 297. Appeal: Matter stricken from abstract. 351.
Munson v. Plummer, 53, 736. Judgment reversed: Restitution of money. 396.
Murphy v. Railway Co., 55, 474. Trespass: Making hay on wild land: Damages. 193.

N

Nordyke & Marmon Co. v. Woolen-Mills Co., 53, 521. Mechanic's lien: Leased premises; Priority. 710.

O

O'Brien v. Putney, 55, 292. *Lis pendens*: Notice: Conditions. 434.
Oleson v. Hendrickson, 12, 222. Forcible detainer: Trial of title: What is not. 202.
Orcutt v. Hanson, 70, 604. Claims against estates: Limitation of action. 508.
Ormsby v. Nolan, 69, 133. Appeal: Amount in controversy. 331.

P

Palo Alto County v. Harrison, 68, 81. Specific performance: Conditions. 730.
Patterson v. Jack, 59, 633. Motion for new trial: When to be filed. 698.
Patterson Rd. Inst. v. Coad, 74, 710. Appeal: Practice: Evidence not identified. 78.
Pearson v. Cummings, 23, 344. Parties plaintiff: Mere trustees. 357.
Pennington v. Jones, 57, 37. Mortgage of crops: Description. 369.
Peterson v. Mining Co., 50, 673. Injury by fellow-servant: Master's liability. 432.
Pettus v. Farrell, 59, 296. Claims against estates: Limitation of action. 508.
Phelps v. Fockler, 61, 340. Good-faith purchasers: Who are not. 705.
Plano Manuf. Co. v. Griffith, 75, 102. Chattel mortgage: Insufficient Description: Actual notice. 369.
Platt v. Railway Co., 74, 131. Water: Pollution by upper owner. 579.
Player v. Railway Co., 62, 727. Injury to passenger riding on wrong car. 749.
Poindester v. Doolittle, 54, 52. Tax Sale: Part of tract for whole tax: Description. 695.
Polk County v. Herd, 37, 366. Intoxicating liquors: Fines: How made liens on real estate. 452.
Porter v. Stone, 51, 373. Street: Grant to the public: How shown. 70.
Pratt v. Stage Co., 27, 363. Appeal: Errors correctible in trial court. 632.
Prescott v. Gonser, 34, 175. *Mandamus*: Demand: Limitation of action. 473.
Puttman v. Halley, 24, 425. Deed: Parol to show real consideration. 163.

R

Randolf v. Town of Bloomfield, 77, 50 (ante). Nuisance: Damages. 531, 532.
Raridon v. Cent. Iowa Ry. Co., 65, 640; 69, 527. Negligence: Care to avoid injury. 32.
Reeves v. Royal, 2 G. Greene. 451. New trial: Cumulative evidence. 560.
Reynolds v. Wilmeth, 45, 693. Tenants in common: Recovery of rent by one of another. 73.
Rice v. Bates, 68, 393. Tax sale: Notice to redeem: Who to make proof of service. 713.
Rice v. Haddock, 70, 319. Tax title: Statute of limitations. 714.
Rice v. Savery, 22, 470. Parties plaintiff: Mere trustees. 357.
Riddle v. Fletcher, 72, 455. Appeal: Less than \$100: Certificate. 403.
Robb v. McBride, 23, 336. Homestead: Abandonment: Evidence. 366.
Roberts v. Corbin, 23, 355. Appeal: From right judgment based on wrong reason. 591.
Roland v. Railway Co., 61, 380. Mechanic's lien: Sub-contractor: Contractor paid in advance. 716.
Ross v. Chicago & N. W. Ry. Co., 72, 625. Railroads: Negligent fires: evidence. 133.
Royer v. Foster, 62, 321. Covenant of warranty: Breach: Eviction. 437.

Runge v. Hahn, 75, 733. Short-hand notes of evidence: Translation to be filed when. 124.
Ryan v. Heenan, 76, 589. Attachment: Appeal: Delay: Dissolution. 585.

S

Sawyer v. Brossart, 67, 678. Sale: Proposal and acceptance. 315.
Scott v. County of Chickasaw, 53, 47. Illegal taxes: Recovery: Limitation. 472.
Sesterhen v. Sesterhen, 60, 301. Judgment for alimony: Mortgage: Priority. 484.
Shawhan v. Long, 26, 492. Administrator's right to unaccrued rents. 491.
Sherrod v. Langdon, 21, 519. Sale of animals: Breach of warranty: Damages. 80.
Shirland v. Bank, 65, 96. Homestead: Abandonment: Evidence. 366.
Shively v. Cedar Rapids, I. F. & N. W. Ry. Co., 74, 169. Nuisance to realty: Damages. 52, 581.
Shoemaker v. Porter, 41, 197. Tax sale: Redemption by agreement. 281.
Shuver v. Klinkenberg, 67, 544. Forcible entry and detainer: Notice to quit: Time. 469.
Slosson v. Burlington, C. R. & N. Ry. Co., 60, 215. Railroads: Negligent fires: Evidence. 139.
Small v. Chicago, R. I. & P. Ry. Co., 50, 338. Railroads: Negligent fires: Evidence. 138; Effect of contributory negligence, 656, 659 *et seq.*; 663.
Smith v. Griffin, 59, 409. Notice by publication: Personal judgment void. 359.
Smith v. McLean, 24, 325. Replevin: Demand as condition. 19.
Smith v. Powell, 55, 215. *Certiorari*: When proper remedy. 651.
Spence v. McDonough, 77, 460 (*ante*). Waters: Rights of upper and lower owners. 578.
Stapleton v. King, 33, 30. Parol to affect writing. 606.
State v. Anderson, 39, 275. Highway: Establishment: Jurisdiction. 641.
State v. Birmingham, 74, 407. Easement: Prescription. 312.
State v. Boynton, 75, 753. Wrongful seizure under chattel mortgage. 20.
State v. Bruce, 48, 536. Verdict: Drinking of liquors by jurymen. 216.
State v. Douglas, 73, 279. Selling liquors in violation of permit: Punishment. 200.
State v. Falconer, 70, 418. Criminal law: Twice in jeopardy. 249.
State v. Fooks, 65, 452. Right to be confronted with witnesses: Waiver. 272.
State v. Henderson, 40, 242. County treasurer's bond: Who may sue on. 539.
State v. Leach, 71, 55. Appeal: Bill of exceptions filed too late. 429.
State v. Livingston, 64, 560. Verdict: Drinking of liquors by juror. 216.
State v. Mewherter, 46, 88. Criminal law: Change of venue. 423.
State v. Mitchell, 58, 567. Easement: Prescription. 312.
State v. Ostrander, 18, 485. Indictment: How many jurors must concur. 197.
State v. Parker, 66, 586. Criminal law: Twice in jeopardy. 249.
State v. Perigo, 70, 660. Change of venue in criminal cases. 212, 425.
State v. Polson, 29, 133. Right to be confronted with witnesses: Waiver. 272.
State v. Postlewait, 14, 449. Evidence: Error cured by instructions. 57.
State v. Ray, 50, 520. Criminal law: Change of venue. 423.
State v. Read, 49, 85. Criminal law: Change of venue: Prejudice of judge: Discretion. 425.
State v. Schaffer, 74, 707. Evidence: Error cured by instructions. 57.
State v. Shelton, 64, 333. Qualification of grand juror. 421; Number of jurors necessary to indict. 422.
State v. Wetmer, 64, 244. Highway: Establishment: Jurisdiction. 641.
Sterling Manuf. Co. v. Early, 69, 94. Judgment not indexed: Notice. 386.
Stewart v. Board, 30, 9. Statutes: Presumed to be constitutional. 523.
Stewart v. Wright, 52, 337. Mechanic's lien: Sub-contractor: Contractor paid in advance. 716.
Stiles v. Est. of Botkin, 30, 60. Motion for new trial: When to be filed: Record on appeal. 698.
Stone v. Insurance Co., 68, 740. Insurance: False statement: Knowledge of agent. 177.
Stone v. Woodbury County, 51, 522. Railroad aid taxes: County not liable for. 539.
Stringham v. Brown, 7, 38. Administrator's right to unaccrued rents. 491.
Stubenrauch v. Neyesch, 54, 567. *Certiorari*: When proper remedy. 651.
Sullens v. Chicago, R. I. & P. Ry. Co., 74, 659. Evidence: Error cured by charge. 57.
Sullivan v. Railway Co., 11, 421. Injury by fellow-servant: Master's liability. 432.

T

Tallant v. City of Burlington, 39, 543. Special tax: Collection: Liability. 472.
Taylor v. Trulock, 55, 448. Parol to affect writing. 607.
Ten Eyck v. Casad, 15, 524. Mortgagee in possession: Rents and profits. 68.
Thomas v. Desney, 57, 58. Judgment: Wrong name: Notice, 384; Not indexed: Notice. 386.
Thornburg v. Madren, 33, 330. Surety: Discharge. 15.
Tomblin v. Ball, 46, 190. Assignment of error: Too general. 150.
Town of Cherokee v. Land Co., 52, 279. Town council: Establishment of street. 459.
Townsend v. Isenberger, 45, 673. Conveyance: Rents not accrued follow. 490.
Trayer v. Reader, 45, 272. Deed: Parol to show real consideration. 168.
Treadway v. Railway Co., 40, 526. Evidence: Admissions of agent. 433.
Troughear v. Coal Co., 62, 576. Injury by fellow-servant: Master's liability. 432.
Trulock v. Bentley, 67, 603. Tax title: Statute of limitations. 714.
Tufts v. Larned, 27, 339. Deed: Reformation: Evidence. 328.
Turner v. Hitchcock, 20, 318. Tort-feasors: Each liable for whole damage. 580.
Turner v. Younker, 76, 258. Fraud: Degree of proof. 729.

V

Van Driel v. Rosiers, 26, 576. Accrued rent does not pass with title. 490.
Vannice v. Bergin, 16, 555. Mortgage: Merger in deed. 66.

Varnum v. Look, 65, 751. Tenants in common: Recovery of rent by one of another. 73.
Verry v. Railway Co., 47, 549. Evidence: Admissions of agent. 488.
Viele v. Insurance Co., 26, 9. Practice: Opening and closing. 297.
Vimont v. Railway Co., 64, 514. Parties plaintiff: Mere trustees. 357.

W

Wachendorf v. Lancaster, 61, 509. Deed: Reformation: Evidence. 166, 328.
Walker v. Sioux City & I. F. Town Lot, etc., Co., 66, 752. Counter-claim: What is. 126.
Waller v. Assurance Co., 64, 101. Policy: Breach of condition as to ownership. 320.
Waltemeyer v. Wisconsin, I. & N. Ry. Co., 71, 626. Right-of-way damages: What land considered. 28.
Warner v. Cammack, 87, 642. Debt arising from false representations. 596.
Washington County v. Jones, 45, 260. Deputy county clerk: Employment: Compensation. 346.
West v. Railway Co., 77, 654 (ante). Railroads: Negligent fires: Effect of contributory negligence. 664, 666, 668.

White v. Smith, 66, 313. Tax sale: notice to redeem. 695.
Whiting v. Root, 52, 292. Appeal: From right judgment based on wrong reason. 591.
Whitsett v. Railway Co., 67, 159. Undisputed facts: Question for jury. 404.
Wickersham v. Reeves, 1, 418. Mortgage: Merger in deed. 66.
Wilcox v. McCune, 21, 296. Appeal: Review of demurrer: What record must show. 565.
Williams v. Gartrell, 4 G. Greene, 287. Assignment for creditors: Conditions: Validity. 109.
Winn v. Murehead, 52, 64. Conveyance: Rents not accrued follow. 490.
Woodbury v. McGuire, 42, 839. Defective original notice: Judgment not void. 682.
Woodward v. Davis, 58, 657. Mortgage: Merger in deed. 66.

Z

Zigefoose v. Zigefoose, 69, 391. Easement Prescription. 312.
Zimmerman v. Insurance Co., 76, 352. Policy: Breach of condition as to ownership. 320.

CEMETERIES.

SALE OF UNUSED CEMETERY GROUND. See Township Trustees, 1.

CERTIORARI.

WHEN NOT PROPER REMEDY. See Insurance, 1.

CHANGE OF VENUE.

See VENUE.

CHATTEL MORTGAGES.

1. OF UNDIVIDED HALVES OF FIRM PROPERTY: PRIORITY. W. and M. were partners in the hardware business. W. mortgaged his undivided one-half interest in the stock of goods to L. to secure a debt which W. owed him. Afterwards W. purchased of M. the other undivided one-half of the stock, and, to secure a part of the purchase price, mortgaged the whole stock to him. Afterwards the whole stock was attached by other and subsequent creditors of W. and converted into money, which was in the hands of a receiver awaiting disposition by the court. The amount due on L.'s mortgage exceeded the one-half of the amount of the proceeds of the goods, and so did the amount due on M.'s mortgage. *Held*, as between L. and M.'s assignee, that each had a lien on the undivided one-half of each article composing the stock, and that each was entitled to have applied on his mortgage the one-half of the money in the hands of the receiver. [BECK, J., dissenting.] *Burdette v. Woodworth*, 144.
2. DEFECTIVE DESCRIPTION: GOOD AS TO SHERIFF HAVING ACTUAL NOTICE. The defendant in this case, as sheriff, levied upon a stock of goods upon which the plaintiff held a chattel mortgage. The goods were described in the mortgage as being on a certain lot and block, but were not otherwise located. *Held* that, though this description was so indefinite that the recording of the mortgage would not impart constructive notice to the sheriff, yet, as he had actual notice, through his deputy, who levied the attachment, the mortgage was valid as against him, and he could not hold the goods. *Cole v. Green*, 307.

3. **OF GROWING CROPS : INSUFFICIENT DESCRIPTION : ACTUAL NOTICE TO PURCHASER OF LAND.** The owner of land, after mortgaging his growing crops, sold the land, while the crops were still growing, to plaintiff, and then took a lease of the land from her. Conceding that the description of the property in the mortgage was so indefinite that the record of it did not impart constructive notice to third persons, yet, since it appears that plaintiff had actual knowledge of it, and of the property which it was designed to cover, *held* that the claim of the mortgagee to the crops was good as against her. (See opinion for cases cited.) *Luce v. Moorehead*, 867.
4. ———: **NOTICE TO PURCHASER OF LAND : EVIDENCE.** To prove actual notice to the plaintiff, in such case, of the mortgage in question, defendant was permitted to introduce in evidence several mortgages executed by the mortgagor, to persons not parties to the action, for crops grown on the land. *Held* that in this there was no error, because the evidence tended to show that, during the negotiations resulting in the conveyance to plaintiff, she was fully advised of such mortgages, and of the uses to which the crops were devoted; wherefore the mortgages, and what was said about them during the negotiations, became material. *Id.*
5. **FRAUD : EVIDENCE : INSTRUCTION.** In an action by the mortgagees of chattels to recover them from an officer holding them under an attachment, it is not necessary for the defendant, in order to succeed, to prove both that the mortgages were without consideration, and that they were made to defraud the creditors of the mortgagor; and the instructions in this case (see opinion) do not, when considered together, as they should be, so hold. *Riegelman v. Todd*, 696.
6. **PRIORITY.** See *Mechanics' Liens*, 4.

CITIES AND TOWNS.

1. **STREETS: EVIDENCE OF TITLE IN PUBLIC.** In this action to compel the defendant to construct a crossing at the intersection of its railway with an alleged street of plaintiff, plaintiff had the burden to establish that the alleged street was a public highway. *Held* that that fact was not established by the introduction of a duly acknowledged and recorded plat of the town, made in 1856, without showing further that the person laying out the town had title to the land. (Compare *Porter v. Stone*, 51 Iowa, 878.) *Town of Edenville v. Chicago, M. & St. P. Ry. Co.*, 69.
2. **INJURY ON DEFECTIVE WALK: CONTRIBUTORY NEGLIGENCE.** Plaintiff's wife was injured by a defect in defendant's sidewalk. She knew that the walk was out of repair, but it does not appear that she knew or thought that it was dangerous, and it was the only walk leading from her home to where she was going. *Held* that she could not be charged, as matter of law, with contributory negligence on the ground that she used it, knowing that it was out of repair. (See opinion for cases distinguished.) *Troxel v. City of Vinton*, 90.
3. **PURCHASE OF LAND FOR STREET: COLLUSION AND FRAUD: EVIDENCE.** In an action against the defendant town for the price of land sold it for a street, the defense was that the purchase was unlawful, on the ground that it was in fact made for the benefit of a railroad company which desired the ground for a right of way, and that the plaintiff and others combined together to have the land procured for the railroad company, but ostensibly for the town. On this issue, *held* that evidence was properly admitted tending to

show that the company was, at the time of the purchase, trying to get the right of way, and the record of condemnation proceedings was competent for that purpose, though the awards had not been paid. Also that the testimony of one who was mayor of the town at the time, as to what was said and done by the town council, as showing the purpose of the council in establishing the street for which it was pretended the land was wanted, was material to the issue and properly admitted. *Strahan v. Town of Malvern*, 454.

4. ———: ———: INSTRUCTIONS. In such case the court properly gave instructions to the effect that the jury should not inquire as to the necessity of the street for which the land was ostensibly bought, that being a matter for the discretion of the town council, but that they should inquire as to the purpose of the council in establishing the street; that is, whether the real design was to establish a street or to procure a right of way for the railroad company. *Id.*
5. ORDINANCE ESTABLISHING STREET: PRESUMPTION AS TO PUBLIC PURPOSE: EVIDENCE TO REBUT. When a town council has passed an ordinance establishing a street, it must be presumed that it was established for public use; but where it is claimed that the real purpose was to provide a right of way for a railroad,—which is not a public purpose within the meaning of the law as to the authority of the council in such cases,—the fact may be shown by evidence overcoming the presumption. *Id.*
6. PROCURING LAND FOR RAILROAD: ULTRA VIRES. The purchase of land by a town for the use of a railroad for right of way, though ostensibly for a public street, is *ultra vires*, and the purchase price cannot be collected by one having knowledge of the facts and aiding in the transaction. *Id.*
7. LIABILITY OF UNPLATTED LANDS FOR CITY TAXES. See Taxation, 8, 4.

CODE.

See STATUTES CITED, CONSTRUED, ETC.

CONFLICT OF LAWS.

See INSURANCE, 2.

CONSIDERATION.

1. LEGAL AND ILLEGAL. See Contracts, 2; Mortgages, 4.
2. PRESENCE OR ABSENCE OF. See Fraudulent Conveyance, 2, 5, 7; Mortgages, 7; Promissory Notes, 2; Schools and School Districts, 4; Sureties, 1.
3. FAILURE OF. See Promissory Notes, 1; Vendor and Vendee, 7, 9.
4. IMPORTED BY WRITTEN CONTRACT. See Promissory Notes, 1; Pleading, 11.

CONSTITUTIONAL LAW.

1. CURATIVE ACTS: VOID PROCEEDINGS OF SUPERVISORS: MUSCATINE ISLAND LEVEE. Where proceedings of a board of supervisors are void for want of jurisdiction, and the thing wanting in such proceedings, and which was necessary to be done to give jurisdiction, is something the legislature might have

dispensed with by a prior statute, then it is not beyond the power of the legislature to dispense with it by a subsequent curative statute. Accordingly, where the defendant board of supervisors proceeded to construct a levee on Muscatine island, and to assess the cost thereof against certain lands supposed to be benefited thereby, but it was held by this court (*Richman v. Board*, 70 Iowa, 627) that the proceedings were void for want of jurisdiction, "because a petition was not filed in the office of the county auditor, signed by a majority of the persons, residents of the county, owning lands adjacent to the improvement, setting forth the same, and the starting point, route and *termini*," as provided by statute in such cases, *held* that this jurisdictional act was one which the legislature might have dispensed with in the first instance, and that therefore chapter 17, Laws of 1886, enacted to validate said proceedings, was not unconstitutional on the ground that the defect was incurable. (Compare *Boardman v. Beckwith*, 18 Iowa, 292.) *Richman v. Supervisors of Muscatine County*, 513.

2. ———: MUSCATINE ISLAND LEVEE: COMPENSATION FOR PRIVATE PROPERTY: NOTICE. Said curative act does not provide for the taking of private property without compensation, within the legal meaning of those terms, nor does it authorize the assessment of a tax without an opportunity for a hearing on notice; for such opportunity is specially provided for in the act. (*Gatch v. City of Des Moines*, 68 Iowa, 718, *distinguished*.) *Id.*
3. ——— : ——— : LOCAL AND SPECIAL LEGISLATION. Said curative act is not obnoxious to section 30, article 3, of the constitution, which provides that the general assembly shall not pass local or special laws in such cases, where a general law can be made applicable; for no general law could have been made applicable; or if a law could have been framed to meet the case, couched in general language, it would still have been local and special in design and effect; and the mere wording of the law, without regard to legislative purpose, is not the guide for constitutional interpretation. At all events, the enactment of the special law is evidence of the design of the legislature, and of its belief that a general law could not be made applicable; and, as it does not clearly violate the constitutional provision in this regard, this court cannot declare it invalid on that ground. (See *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Board*, 30 Iowa, 9.) *Id.*
4. ——— : ——— : TITLE. The title of said curative act is as follows: "An act to legalize the proceedings of the boards of supervisors of Muscatine and Louisa counties in locating and constructing a levee on Muscatine island, in said counties, and to provide for the assessment of the costs thereof on the lands benefited thereby." *Held* that the act was not obnoxious to that clause of the constitution (sec. 29, art. 3), which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." *Id.*
5. IMPRISONMENT FOR CONTEMPT. See Execution, 2.
6. DISTRICT COURT AT AVOCA. See Courts, 3.
7. INDICTMENT BY FOUR GRAND JURORS. See Criminal Law, 8.
8. INTER-STATE COMMERCE. See Intoxicating Liquors, 1.
9. RIGHT TO BE CONFRONTED WITH WITNESSES: WAIVER. See Criminal Law, 24.

CONTEMPT.

1. IMPRISONMENT FOR : CONSTITUTIONALITY. See Execution, 2.
2. OF INJUNCTION AGAINST SALOON NUISANCE. See Intoxicating Liquors, 6, 7.

CONTINUANCE.

AFFIDAVIT FOR MAY BE READ TO JURY IN ARGUMENT. See Practice and Procedure, 6.

CONTRACTS.

1. IN TWO PARTS : CONSTRUCTION. Two contracts which are separate in form, but in fact are only parts of the same contract, are to be construed together. *Bigelow v. Wilson*, 603.
2. LEGAL AND ILLEGAL AGREEMENTS : DIVISIBILITY : AGREEMENT NOT TO PROSECUTE. Plaintiff, an unmarried woman, being pregnant by defendant, agreed in writing with him as follows: (1) To leave and stay away from their place of residence one year; (2) to waive civil claims against defendant; (3) to waive criminal claims against him; and, in consideration thereof, defendant agreed to pay her a certain sum monthly, and to convey to her certain real estate. In a subsequent civil action for the seduction, this contract was pleaded as a defense. *Held*—
 - (1) That the first element in plaintiff's agreement may have been lawful, but not if the purpose of her absence was to defeat a criminal prosecution.
 - (2) That the second element—the waiver of civil claims—was lawful.
 - (3) That the third element—the waiver of criminal claims—was an agreement not to prosecute defendant criminally, and was clearly unlawful.
 - (4) That the three elements of her agreement were so connected, as constituting together the consideration for defendant's promise, that they could not be separated, and that therefore the contract was void *in toto*, and constituted no defense to the action for seduction. *Baird v. Boehner*, 622.
3. PARTY : HUSBAND AND WIFE : EVIDENCE. Plaintiff, a married woman, under an oral contract which she alleged she made with her mother and her mother's husband, took possession of and resided in the mother's house, and maintained the mother and mother's husband therein during the mother's life, in consideration of having the property on her death. The mother's husband lived with her and was provided for and supported by plaintiff. *Held* that he must be regarded as a party to the contract, though he testified that he did not know of or concur in it. *Drake v. Painter*, 781.
4. NO AGREEMENT OF MINDS. See Mortgages, 3.
5. ILLEGAL CONSIDERATION : BURDEN OF PROOF. See Mortgages, 4.
6. FOR SUPPORT OF PARENTS FOR INTEREST IN FARM : DISAFFIRMANCE. See Real Estate, 2, 3.
7. RATIFICATION. See Schools and School Districts, 2.

8. ACCEPTANCE MUST BE IN TERMS OF OFFER. See Vendor and Vendee, 14.
9. RESCISSION. See Vendor and Vendee, 5; Deeds, 3.
10. BY AGENT FOR PRINCIPAL. See Agency, 2.
11. REFORMATION. See Deeds, 2, 5.

FOR CONTRACTS OF VARIOUS KINDS, see appropriate titles.

CONTRIBUTORY NEGLIGENCE.

1. WHEN RULE DOES NOT APPLY. See Nuisances, 8; Railroads, 10, 14, 18.
2. IN USE OF DEFECTIVE WALK. See Cities and Towns, 2.
4. IN USE OF DEFECTIVE MACHINERY. See Master and Servant, 3.

See, also, RAILROADS, 28, 31.

CONVERSION.

OF PROPERTY UNDER WRIT. See Attachment, 1; Execution, 3.

CONVEYANCE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CHATTEL MORTGAGES; DEEDS; FRAUDULENT CONVEYANCES; VENDOR AND VENDEE.

CORPORATIONS.

1. INTEREST IN STOCK: LIABILITY FOR ASSESSMENTS. E. owned shares of stock in the defendant corporation, which he contracted to sell to plaintiff, and plaintiff made his note for the purchase price, but the note was not paid, and the stock was not transferred to plaintiff on the books of the company. *Held* that plaintiff was not liable for assessments on the stock. (See cases cited in opinion.) The fact that plaintiff, by virtue of a proxy, voted at meetings of the stockholders on the stock of E., and that defendant took his note to E., but not on account of any transaction between it and plaintiff, did not make him liable for assessments. Neither did the fact that he subscribed for stock, without ever becoming in fact a stockholder, make him liable. *Cormac v. Western White-Bronze Co.*, 32.
2. SALE OF PROPERTY: COMPLAINT OF STOCKHOLDER. Plaintiff was a stockholder in a printing company which was greatly embarrassed. At a meeting at which all the officers and stockholders, except plaintiff, were present, the assets of the company were transferred to another company, whose paid up stock was taken in payment. Plaintiff was known to be opposed to such transfer, and he was not notified of the meeting at which it was made, nor was he present thereat, but the transaction seems to have been made in good faith and in the interest of the company. *Held* that these facts did not show any fraud upon plaintiff, and that without a showing of fraud he had no ground for complaint either at law or in equity. *Sawyer v. Dubuque Printing Co.*, 242.

3. **POWER OF OFFICER TO SETTLE DISPUTED CLAIM.** The purchase of bonds and the paying for them were within the ordinary business of defendant. Its treasurer was authorized to make such purchases for defendant, and to make payment. *Held* that he was also authorized to determine the amount unpaid, even to the extent of compromising a dispute in regard to it. *Gafford v. American Mortgage & Investment Co.*, 736.
4. **POWER OF TREASURER: EVIDENCE.** In an action on drafts accepted on behalf of the defendant by its treasurer, where there was *prima-facie* evidence that the defendant's records gave the treasurer authority to accept the drafts, which record was not disputed, *held* that the testimony of a witness for defendant, that he found nothing of record in the books of defendant to show that the treasurer had such authority, was properly stricken out on motion as being but the conclusion of the witness. *Id.*
5. **PUBLIC: RECORDS OF: CONCLUSIVENESS.** See Schools and School Districts, 1.
6. **FOR MUNICIPAL CORPORATIONS.** See Cities and Towns; Counties; Schools and School Districts.

FOR CORPORATIONS OF VARIOUS KINDS, see appropriate titles.

COSTS.

APPORTIONMENT ON APPEAL. This court cannot hear a complaint that the costs were all taxed by the trial court to appellant when they should have been apportioned, where no motion or request of that kind was made below. *Cox v. Mason City & Ft. D. Ry. Co.*, 20.

COVENANT OF WARRANTY.

BREACH OF: WHAT IS. See Vendor and Vendee, 6.

COUNTER-CLAIMS.

WHAT IS NOT. See Pleading, 5.

COUNTIES.

1. **LIABILITY FOR SALARY OF DEPUTY TREASURER.** Section 771 of the Code, and section 5, chapter 184, Laws of 1880, are not in conflict. The former relates to the employment by a county officer of temporary assistance when the exigency of his duties requires it, without the authority of the supervisors; the latter to the employment of a regular deputy with such authority. In the former case, where the necessity for the temporary assistance is shown, and the board of supervisors refuses, on application, to furnish it, and the officer himself employs an assistant and pays him a reasonable compensation, he may recover the same from the county. (See cases cited in opinion.) *Harris v. Chickasaw County*, 345.
2. **UNLAWFUL EXPENDITURE OF MONEY: RIGHT OF ACTION TO ENJOIN.** A taxpayer may maintain an action in his own name to prevent unlawful acts by public officers, which would increase the amount of taxes he is required to pay, or diminish a fund to which he has contributed. (See opinion for citations.) Accordingly, *held* that an action may be maintained by a taxpayer to prevent the county officers from paying out money on a contract for the erection of a bridge which the county had no legal authority to erect. *Snyder v. Foster*, 638.

3. **POWERS OF SUPERVISORS: BRIDGES OVER NAVIGABLE LAKES.** Boards of supervisors have no power to construct bridges over navigable lakes, no such power having been conferred by statute upon them; consequently county funds cannot be appropriated to the payment of claims arising from the construction of such a bridge under contract with the county; and the fact that the bridge is furnished with a draw to admit the passage of boats makes no difference. See opinion for discussion of the point on principle and authority by ROBINSON, J.) *Id.*

See COUNTY TREASURER, 1, 2.

COUNTY AUDITOR.

DUTY AS TO TAX LISTS. See Taxation, 1.

COUNTY TREASURER.

1. **FAILURE TO PAY RAILROAD TAX: LIABILITY.** Where a county treasurer failed during his term of office to pay over on demand to a railroad company the taxes voted to the company, and which he had collected, and he did not turn over the money to his successor, and it was never passed to the credit of the county nor used for its benefit, neither his successor nor the county was liable therefor, but his failure was a breach of his official bond, for which he and his sureties were liable. (See opinion for citations.) *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 535.
2. **BOND OF: WHO MAY SUE ON.** The bond of a county treasurer was conditioned that he "shall promptly pay over to the person or officer entitled thereto all money which shall come into his hands by virtue of the said office, and shall promptly account for all balances of money remaining in his hands at the termination of his office." The county was the obligee in the bond. The treasurer collected taxes voted in aid of a railroad company, and neither paid them over to the company, when demanded, during his term of office, nor turned them over to his successor. *Held* that the company was the proper party to bring an action on the bond for his defalcation, under Code, section 2552. (*State v. Henderson*, 40 Iowa, 422, *distinguished.*) *Id.*
3. **DEPUTY: SALARY OF.** See Counties, 1.
4. **IS TRUSTEE FOR TAXES IN AID OF RAILROADS COLLECTED BY HIM.** See Taxes, 2.

COURTS.

1. **DISTRICT COURT: JURISDICTION: CAUSES TRANSFERRED BY CONSENT FROM JUSTICES' COURTS.** There is no provision in the statutes, and therefore no warrant, for the transfer to the district court of causes begun in justices' courts, except by appeal; and the district court has no jurisdiction to entertain such a cause transferred to it by consent, but should dismiss it upon motion of one of the consenting parties. *Evans v. Phelps*, 526.
2. **DISTRICT COURT AT AVOCA: JURISDICTION: CAUSE TRANSFERRED BY AGREEMENT.** This action for damages was begun in Shelby county, and, by agreement of parties, it was transferred to the circuit court of Pottawattamie county, at Avoca. Afterwards, by chapter 184, Laws of 1886, the circuit courts of the state were abolished, and their powers transferred to the district courts; and it was provided that the district court of the counties should be held at other places than county seats where the circuit court was authorized so to

be held, and should hear and determine civil causes at such places, only as the circuit court had done. Avoca is not a county seat, and the circuit court at that place was established for the transaction of business arising in that part of the county east of the west line of range forty. *Held* that the district court at Avoca had jurisdiction to hear and determine this cause,—the subject-matter being within its jurisdiction, and the jurisdiction of the parties being conferred by the agreement to transfer it to the circuit court. (*Cerro Gordo County v. Wright County*, 59 Iowa, 485, *distinguished*.) *Milner v. Chicago, M. & St. P. Ry. Co.*, 756.

3. ——— : LIMITING JURISDICTION : CONSTITUTIONALITY. It is competent for the legislature to determine that terms of the district court may be held at places other than county seats for the transaction of certain business and the trial of particular cases; and so chapter 184, Laws of 1886, in so far as it authorizes the district court to be held at Avoca, in Pottawattamie county, but limiting it to such business as the circuit court at that place was authorized to transact, is not repugnant to section 6, article 5, of the constitution, conferring general jurisdiction upon the district court. *Id.*
4. ——— : AS SUCCESSOR TO CIRCUIT COURT. Section 17, chapter 184, Laws of 1886, providing that all laws inconsistent with that chapter were thereby repealed, did not, upon its taking effect, July 4, 1886, operate to abolish the circuit court at Avoca, because section 1 of said act provided that the circuit court should not be abolished until January 1, 1887; and, by the terms of said act, a cause pending in the circuit court at Avoca at the time the act took effect passed to the jurisdiction of the district court, which was provided to succeed the circuit court at that place. *Id.*
5. SUCCESSION OF JUDGES. See Judges, 1.

See JUSTICES AND THEIR COURTS.

CRIMINAL LAW.

1. GRAND JUROR : FREEDOM FROM BIAS : EXAMINATION. One of the grand jurors who found an indictment for murder in the first degree against defendant was examined at length as to his freedom from bias, and the material part of his examination is set out in the opinion (which see), from which it appears that he had engaged in some talk of lynching the defendant; but *held* that the examination evidenced a state of mind reasonably free from any prejudice or conviction that should disqualify him, and that the court did not err in allowing him to sit on the case. *State v. Billings*, 417.
2. ——— : NUMBER NECESSARY TO INDICT. In a county where, under the present statute, the grand jury consists of five members, and a challenge is sustained as to one, and his place is not filled, the remaining four may, if they all concur, find a valid indictment. (*State v. Shelton*, 64 Iowa, 333, *followed* in principle.) *Id.*
3. GRAND JURY : INDICTMENT BY VOTE OF FOUR : CONSTITUTIONALITY. Pursuant to an amendment to the constitution adopted in 1884, providing that "the grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide," the Twenty-first General Assembly (chap. 42) provided that in counties having a population of sixteen thousand, or less, the grand jury shall be composed of five members, and, in counties having a larger population, of seven members; also that when the grand jury is composed of five members, an indictment may be found by the concurrence of four,

and when composed of seven members, by a concurrence of five. *Held* that this last provision was not unconstitutional on the ground that it authorized an indictment to be found by less than the smallest number of which the grand jury could be composed, which was not allowable under the common law and the constitution before the adoption of said amendment. (Compare *State v. Ostrander*, 18 Iowa, 435.) *State v. Salts*, 193.

4. **CHANGE OF VENUE: PREJUDICE OF JUDGE: DUTY OF COURT.** Where a change of the place of trial of a criminal case is sought on the alleged ground of the prejudice of the presiding judge, the judge is not at liberty to avoid the embarrassments of a trial in the face of such objections by granting a change, but must rule upon the application, when fully advised, "according to the very right of it" (Code, sec. 4374), and his ruling will not be disturbed on appeal, unless it is shown that he has abused his discretion; and no such showing is made in this case. *State v. Billings*, 417.
5. ——— : **PREJUDICE OF PEOPLE: SHOWING AND COUNTER-SHOWING: ABUSE OF DISCRETION.** The application for a change of venue in this case, involving a charge of murder in the first degree, was supported by the affidavits of some forty or fifty persons, showing a high state of feeling among the people, and at least some prejudice against defendant, and that there was some talk of lynching him. It also appeared that many other persons applied to to make like affidavits would have done so but for prudential reasons. This showing was opposed by the affidavits of some eight hundred persons, which do not controvert the facts of excitement and prejudice, but do controvert the claim that the excitement and prejudice were so great as to prevent a fair and impartial trial. *Held* (all concurring) that to have granted the change upon the showing made would have been in accord with the general practice in such cases, and (GRANGER, J., *dissenting*) that it was, under all the circumstances, an abuse of discretion for the court to deny the change. (Compare *State v. Read*, 49 Iowa, 85, and *State v. Perigo*, 70 Iowa, 657.) *Id.*
6. **CHANGE OF VENUE: DISCRETION OF COURT.** After a jury had found defendant guilty of murder in the first degree, the verdict was set aside on the ground that one of the jurors was an alien. Defendant then moved for a change of venue because of the alleged prejudice of the people of the county. The motion was supported by the affidavits of defendant and seven others, none of whom were shown to be disinterested, and by thirty-three extracts from newspapers published in the county, but such of these as were calculated to excite prejudice against defendant were published prior to the first trial. The allegation of prejudice was controverted by forty-four counter-affidavits on the part of the state. *Held* that the court did not abuse its discretion by overruling the motion. (See Code, sec. 4374, and *State v. Perigo*, 70 Iowa, 660.) *State v. Kennedy*, 208.
7. ——— : **ORAL EXAMINATION OF AFFIANTS.** Where defendant had moved for a change of venue, and the state had filed counter-affidavits, a motion by defendant to have the affiants on the part of the state brought into court and orally examined, on the alleged grounds that such persons had made up their minds, and expressed their opinion that defendant was guilty, and that their affidavits were false, and that they would so appear upon such oral examination, was properly overruled, where there was nothing in the record, aside from the statements made as the ground of the motion, to indicate that the counter-affidavits were not made in good faith. *Id.*

8. **SELECTION OF JURORS : OBJECTION : APPEAL.** Defendant in this court claims that the trial court erred in refusing him a new trial on the ground that the names of jurors summoned by special *venires* were not written on separate ballots and mixed and drawn from a box, as required by law, but were read from the lists in the hands of the sheriff. The truth of this claim is not shown by the record, and there is nothing to support it except the affidavit of defendant's attorney attached to the motion for a new trial. *Held* not sufficient to overcome the presumption that the jurors were drawn in the manner required by law. *Id.*

9. **NEW TRIAL : INTOXICATION OF JUROR.** A person accused of crime is not required to abide the decision of a drunken juror, but the mere drinking of intoxicating liquors by a juror during an adjournment of court will not authorize the setting aside of a verdict of guilty. (See *State v. Livingston*, 64 Iowa, 560; *State v. Bruce*, 48 Iowa, 586.) The evidence as to the alleged drunkenness of a juror in this case (see opinion) is so unsatisfactory that it cannot be said that the court erred in refusing a new trial on that ground. *Id.*

10. **INDICTMENT : STATING PLACE OF CRIME.** While it is the better practice to allege the venue by express averments in the body of the indictment, it is still sufficient, under section 4305 of the Code, if by reference to the caption it is made clearly to appear that the offense was committed within the jurisdiction of the court. (See opinion for illustration.) *State v. Salts*, 193.

11. ——— : **EMBEZZLEMENT : DUPLICITY.** In cases of larceny and similar offenses, the taking of several articles may be charged in one indictment. And so an indictment charging that defendant, between certain named dates, and at various days between said dates, being the agent of K., did, by virtue of his said employment, have, receive and take into his possession two pianos and seven organs (describing and giving the value of each), the property of said K., and did then and there embezzle the same, was not bad for duplicity on the ground that it charged the embezzlement of distinct chattels, separately described, and designed to be dealt with separately. *State v. Pierce*, 245.

12. **ARRAIGNMENT : WAIVER : TWICE IN JEOPARDY.** In a criminal prosecution, after a jury had been empaneled and sworn and the opening statement had been made for the state, defendant suggested that there had been no arraignment nor plea entered. Thereupon the court ordered him to be arraigned, which was done against his objection, and he asked and was given time to plead, and the jury was discharged, to which he excepted. Next day he pleaded not guilty, and that he had been once in jeopardy by reason of the proceedings of the day before. *Held*—
 - (1) That the court did not err in ordering the arraignment; because defendant's conduct did not amount to a waiver of arraignment.
 - (2) That he was not put in jeopardy by the previous day's proceedings. (Compare *State v. Falconer*, 70 Iowa, 418; *State v. Parker*, 66 Iowa, 586.) *Id.*

13. **EVIDENCE : LIMITATION TO TIME CHARGED : PRACTICE : INSTRUCTIONS.** On the trial of an indictment for obstructing a street on a day named, the defendant objected to evidence tending to show that on different days, before and after the day named in the indictment, the defendant obstructed the street in question. *Held* that the objection was properly overruled, and that the proper

practice was for defendant to move the court to compel the state to elect on which offense it would claim a verdict, and that, in the absence of such motion, the court rightly directed the jury that defendant was guilty if it unreasonably obstructed the street "within the time mentioned in the evidence." (See opinion for citations.) *State v. Chicago, M. & St. P. Ry. Co.*, 442.

14. **EMBEZZLEMENT: EVIDENCE.** Where the evidence showed that defendant, an agent, converted to his own use the property of his principal, and the only question was as to his fraudulent intent; and it appeared that the principal was entitled either to the property or its value in money, for which defendant was required to account; and the evidence tended to show that he had concealed the facts as to the disposition of some of the property, and rendered a false account of his agency in regard to it, and that he failed to comply with the principal's demand for the property, *held* that a verdict of guilty of embezzlement could not be set aside in this court for want of evidence to support it. *State v. Pierce*, 245.
15. **MURDER: CIRCUMSTANTIAL EVIDENCE.** Defendant was convicted of the murder of his wife. The evidence (see opinion) was wholly circumstantial, but plainly showed that the crime had been committed, and tended to show that defendant was the perpetrator of it. *Held* that the verdict of the jury, rendered under proper instructions, finding the defendant guilty, could not be interfered with by this court on the ground that it was not supported by sufficient evidence. *State v. Kennedy*, 208.
16. **LARCENY: POSSESSION OF STOLEN PROPERTY: EXPLANATION: EVIDENCE.** trial for the larceny of two horses. The horses were in the exclusive possession of the defendant and were traded off by him within two days after they were stolen. *Held* that it was therefore incumbent on him to make some reasonable explanation of his possession consistent with his innocence, and that, though the evidence was not wholly consistent, it was for the jury to determine its effect, and that this court could not interfere with a verdict of "guilty," on the ground of insufficient evidence. (See opinion for evidence.) *State v. Whitmer*, 557.
17. **NEW TRIAL: NEWLY-DISCOVERED AND CUMULATIVE EVIDENCE.** The statute does not authorize a new trial in a criminal case on the ground of newly-discovered evidence (*State v. Bowman*, 45 Iowa, 418), nor in any case, where the newly-discovered evidence is merely cumulative, as in this case. (See opinion for citations.) *Id.*
18. **INSTRUCTIONS: CREDIBILITY OF DEFENDANT'S WIFE AS AFFECTED BY HIS CHARACTER AND MOTIVES.** On the trial of defendant for the murder of one Kingsley, the court instructed the jury as follows: "Even though you may believe from the evidence before you that the defendant has been a man of base and degraded life, and that he was, from sordid motives of personal gain, pressing a false charge against Kingsley, or even that defendant and his wife had conspired together to extort money from him, or that the evidence shows that defendant was guilty of other crimes not charged in this indictment, none of such considerations will warrant you in convicting the defendant on this indictment; nor must you allow them to have any other consideration than as showing the *animus* or motive of the defendant towards the deceased, and also as affecting the credit which ought to be given to his testimony and that of his wife, if she participated in any improper motive toward the deceased." Defendant's wife was a very important witness in his behalf. *Held* that the instruction was erroneous, because, though

it was designed to express the correct rule of law, and would be readily so understood by the professional mind, yet its language permitted the jury to consider the acts and misconduct of the defendant, in regard to which his wife had no part or connection, as affecting her credibility, on the single condition that "she participated in any improper motive towards the deceased." *State v. Billings*, 417.

19. **OBSTRUCTION OF STREETS: NECESSITY OF RAILROAD COMPANY.** The obstructing of a street with cars by a railroad company is not excused by the fact that it is necessary for the carrying on of the company's business, though the obstruction be only occasional. (See opinion for citations.) *State v. Chicago, M. & St. P. Ry. Co.*, 443.
20. ———: **MALICE: WILFULNESS: INSTRUCTION.** In a prosecution for obstructing a street, the court instructed the jury that it was not necessary that they should find that the defendant or its employes acted maliciously, in order to find defendant guilty, but that it was sufficient if the street was "wilfully" obstructed; and that to act wilfully means to act "intentionally or knowingly." *Held* not objectionable when considered in connection with another portion of the charge, which expressly directed that to justify a conviction they must find that the obstruction complained of was "unreasonable." *Id.*
21. **MITTIMUS DOES NOT EXPIRE TILL EXECUTED: SERVICE AFTER VOID RETURN.** Where the judgment is that defendant be fined, and be committed in default of payment of the fine, and the clerk makes and delivers to the sheriff a certified copy of the judgment, such copy has the force and effect of a warrant (see Code, sec. 4512), and thereunder the sheriff is required to arrest and commit the defendant; and such warrant does not expire until executed, and if the sheriff returns it "Nothing made," or "Defendant not found in this state," such return is a nullity, not being authorized by law, and the sheriff may afterwards take up the warrant and arrest and commit the defendant thereunder. *McKay v. Woodruff*, 413.
22. **REMITTING FINES BY COMPROMISE: POWER OF DISTRICT ATTORNEY AND SUPERVISORS.** Neither the district attorney nor the board of supervisors has any power to remit fines directly, nor to do so indirectly by the satisfaction of the judgments therefor for a less sum than the fines imposed, even though such compromise may be desirable from a pecuniary point of view; and such satisfaction is no bar to the arrest of defendant upon executions issued upon such judgments, even though the satisfaction is not set aside. *Id.*
23. **PARTIAL AND CONDITIONAL PARDON: SUBSEQUENT ARREST OF DEFENDANT.** A commutation by the governor of a fine so far as to release certain property from the lien thereof, but in no way affecting the defendant's personal liability therefor, and upon condition that he pay all costs, and refrain from the unlawful business for which he was convicted, is no bar to his subsequent arrest and commitment—not at least until he shows that he has complied with the conditions of his commutation. *Id.*
24. **APPEAL: CLERK'S CERTIFICATE TO EXPLAIN RECORD: EVIDENCE ON TRIAL.** In this case, the record in the district court, as certified to this court, is full and regular, and shows a trial by jury upon the evidence, and a verdict of guilty. The clerk of the district court, however, certifies that no evidence was introduced on the trial except the minutes of evidence taken before the grand jury. *Held* that the clerk had no legal authority to make such certificate, and

that it could not be considered, but that this court, in the absence of exceptions to the evidence, must presume that defendant was convicted upon proper evidence; but, if such certificate were considered and taken as true, still this court would not interfere, because no objection was made to the evidence named therein, and it was competent for the defendant to waive the privilege of being confronted with the witnesses against him. (See *State v. Polson*, 29 Iowa, 133, and *State v. Fooks*, 65 Iowa, 452.) *State v. Turney*, 269.

25. **LARCENY AND BURGLARY : MITIGATION OF PUNISHMENT ON APPEAL.** Defendant was convicted of burglary on six indictments and of larceny, committed in connection with his burglaries, on six other indictments, and was sentenced in the aggregate to seventeen and one-half years in the penitentiary. There can be no doubt of his guilt in each case. The total value of the stolen property was found to be \$566. *Held* that this court must be governed wholly by the record, and that there is nothing in the record in this case justifying the mitigation of the sentence. Considerations in defendant's favor not found in the record are proper only to be urged in an application to the executive for pardon. *Id.*
26. **ASSAULT WITH INTENT TO RAPE : PUNISHMENT.** For an assault with intent to rape, committed upon a child of tender years, but in no other respect an aggravated offense, the defendant was sentenced to fifteen years at hard labor in the penitentiary. *Held* not duly proportioned to the degree of the offense, and it is reduced to ten years. *State v. Blunt*, 106.
27. **MISCONDUCT OF COUNSEL : APPEAL : RECORD.** A complaint that the counsel for the state was guilty of misconduct in argument to the jury, in referring to the fact that the defendant did not testify in his own behalf, in violation of section 8636 of the Code, cannot be considered in this court, where the facts relied upon do not appear in the record; but, where the court below refused a new trial on that ground, this court must presume that there was no such misconduct. *State v. Whitmer*, 557.
28. **AS TO OFFENSES RELATING TO INTOXICATING LIQUORS,** see that title.

DAMAGES.

1. **PROXIMATE CAUSE : INJURY TO MARE ESCAPING THROUGH OPENED FENCE.** Plaintiff was pasturing his highly bred mare in an enclosure, and the surrounding country was largely fenced with barbed wire, which is especially dangerous to horses running at large. Defendant wrongfully opened and left open the fence of the enclosure, and the mare escaped through the opening and became entangled with a barbed wire fence and was injured. *Held* that defendant's wrong in opening the fence and leaving it open was what exposed the mare to the danger, and was the proximate cause of the injury; and a direction to the jury to find for the defendant on the ground that it was not the proximate cause was erroneous. *West v. Ward*, 323.
2. **FOR DESTRUCTION OF PERSONAL PROPERTY.** The measure of damages for the negligent destruction of personal property is the value of the property at the time of destruction, with interest at six per cent. per annum to the date of judgment. (*Brentner v. Railway Co.*, 68 Iowa, 530, *distinguished.*) *Johnson v. Chicago & N. W. Ry. Co.*, 666.
3. **FOR WRONGFUL SEIZURE OF PROPERTY.** See Attachment, 1; Execution, 3.

4. FOR NUISANCE TO DWELLING. See Nuisances, 1-8.
5. FOR RIGHT OF WAY. See Railroads, 1, 2, 4-7.
6. FOR WRONGFUL EJECTION OF PASSENGER FROM TRAIN. See Railroads, 29.
7. FOR BREACH OF WARRANTY OF THE SOUNDNESS OF ANIMALS SOLD. See Sales, 1.
8. FOR MAKING HAY ON ANOTHER'S WILD LAND. See Trespass, 1.
9. SPECULATIVE : WHAT ARE NOT. See Vendor and Vendee, 9.
10. FOR POLLUTION OF STREAMS. See Waters, 2.
11. CAUSED BY TRESPASSING ANIMALS : APPRAISEMENT OF. See Animals, 1.

DECREE.

See JUDGMENT.

DEEDS.

1. MISTAKE : WHETHER AS TO CONSIDERATION OR ESTATE GRANTED. Where an agreement for the sale of land provides for a certain sum to be paid therefor, and reserves to the grantor and his tenants the crops growing on the land, and the right of possession until the crops can be harvested, but such reservation is omitted, by mistake, from the deed, the mistake relates to the estate conveyed, and not to the consideration to be paid. *Stewart v. McArthur*, 162.
2. ———: REFORMATION : EVIDENCE. The evidence offered in this case (see opinion) to prove plaintiff's claim that, in the agreement for the sale of land to defendants, the growing crops were to be reserved to himself and tenants, together with the right of possession until such crops could be harvested, and that such reservation was by mistake omitted from the deed, *held* not to be of that clear and satisfactory character which is necessary for the reformation of a written instrument. [BECK, J., *dissenting.*] *Id.*
3. RESCISSION : FRAUD : EVIDENCE. The district court in this case entered a decree rescinding a deed of land and cancelling a note and mortgage given to secure the purchase price, on the ground that the grantor fraudulently pointed out and represented that the tract described in the deed extended to a certain point, when it did not, and that plaintiff therefore received less land than he bargained for. But *held* that the evidence (see opinion) was not of that clear and satisfactory kind which justifies the rescission of a contract, and that the decree should be reversed. *Coughlin v. Richmond*, 188.
4. DELIVERY : FACTS NOT CONSTITUTING. Defendants entered into an agreement with plaintiffs to convey to them certain land in satisfaction of certain mortgages thereon which plaintiffs either owned or controlled, and a deed was at the time made by defendants, who lived in the country, and left at plaintiffs' bank. The deed was a plain warranty deed, and was made to one of the plaintiffs who was at the time absent. No consideration passed at the time,—the mortgages, which were the sole consideration, not being at hand, but plaintiffs were to procure them to be assigned and sent to them, and then the transaction was to be closed up. *Held* that there was no delivery of the deed, and that it was of no effect until the mortgages were delivered. *Head v. Thompson*, 263.

5. **REFORMATION : EVIDENCE REQUIRED.** Courts will never give relief by the reformation of a deed, or annul or set aside deeds, on the ground that they do not conform to the contract of the parties, unless the evidence is clear and satisfactory, and establishes plaintiff's right beyond reasonable doubt. (See cases cited in opinion.) And in this case, where plaintiff claims that it bargained for and purchased more ground than the deed described, and seeks to have the deed reformed, or set aside and a new one decreed, *held* that the evidence (for which see opinion) did not warrant the relief sought. *First Presb. Church v. Logan*, 326.
6. **DELIVERY.** See Assignment for Benefit of Creditors, 2.
7. **COVENANT OF WARRANTY : BREACH : WHAT IS.** See Vendor and Vendee, 6.

DEFAULT.

See JUDGMENT, 2, 3; PRACTICE AND PROCEDURE, 2.

DELIVERY.

1. **OF WRITTEN INSTRUMENTS.** See Assignment for Benefit of Creditors, 2; Deeds, 4; Mortgages, 6.
2. **OF GOODS SOLD.** See Sales, 2.

DEMAND.

AS CONDITION TO ACTION. See Replevin, 1.

DEPOSITIONS.

1. **NOTICE OF TAKING : SERVICE.** A notice of the taking of depositions was addressed to certain attorneys as attorneys for the adverse parties A. and W., and they were in fact the attorneys for both A. and W., but they signed their names to an acceptance of service of the notice as attorneys for W. *Held* that the acceptance was good as against A., in the absence of any objection or claim that they did not appear in the case for A. *Walker v. Abbey*, 702.
2. **USE OF.** See Evidence, 9, 10.

DESCRIPTION.

DEFECTIVE DESCRIPTION OF PROPERTY. See Chattel Mortgages, 2, 3; Mechanic's Liens, 5; Railroads, 1.

DISTRICT COURT.

See COURTS, 2-4.

DISTRICT ATTORNEY.

NO POWER TO REMIT FINES. See Criminal Law, 22.

DIVORCE.

1. **INHUMAN TREATMENT : FACTS NOT CONSTITUTING.** Action by wife for a divorce on the ground of inhuman treatment endangering her life. The parties were married in 1872, and five children had been born to them. Each had children by a former spouse. At the time of their marriage plaintiff was thirty-four, and defendant fifty-five years old. The evidence (for which see opinion) shows that the parties had lived unhappily together on account of a variety of troubles growing out of jealousies and other causes, and that

they had twice separated, but fails to show that plaintiff's health was seriously or permanently impaired by the treatment of which she complains, or that she was free from faults contributing to their unhappiness, but rather leads to the conclusion that much of the trouble which led to their separation was due to plaintiff's poor health and indiscreet conduct, and defendant's age and its consequences. *Held* that a divorce was properly denied. *McKee v. McKee*, 484.

2. PETITION FOR AND FOR ALIMONY. See *Lis Pendens*, 1.

DOMESTIC RELATIONS.

DAUGHTER WORKING AS MEMBER OF FAMILY : COMPENSATION. Plaintiff, from the age of twenty-two to the age of twenty-eight, was unmarried, and lived with her father, mother and three brothers in the same house, and they were all engaged in market-gardening. At the end of this time the plaintiff was married and ceased to be a member of the family. At this time their joint earnings amounted to about fifteen hundred dollars, which was used in part payment of a farm, the title of which was made to the three brothers, but possession was taken by them together with the father and mother. Afterwards the parents died, and one of the brothers, having bought the interests of the other two, himself died, and plaintiff now claims that part of the money originally put into the land was hers, and she seeks to recover therefor of the administrator of the deceased brother. *Held* that she could not recover, because she failed to show any contract for compensation for her services while a member of her father's family; and, in the absence of such contract, the law presumes that there was to be no compensation, and will grant her none. (Compare *Cowan v. Musgrave*, 78 Iowa, 884.) *Spitzmiller v. Fisher*, 289.

See **DIVORCE ; HOMESTEADS**, 8, 6; **PROMISSORY NOTES**, 2

DOWER.

EXTINGUISHED BY PARTITION SALE AGAINST HUSBAND. A sale of land in partition proceedings is a "judicial sale" within the meaning of section 2440 of the Code, and such a sale of the husband's interest in land, in a proceeding to which he is a party, extinguishes the wife's right of dower, even though she is not made a party thereto. *Williams v. Wescott*, 832.

EASEMENTS.

See **LANDLORD AND TENANT**, 1.

ELECTIONS.

See **SCHOOLS AND SCHOOL DISTRICTS**, 5, 6.

EMBEZZLEMENT.

INDIOTMENT : EVIDENCE. See **Criminal Law**, 11, 14.

EMPLOYER AND EMPLOYEE.

See **MASTER AND SERVANT ; RAILROADS**, 21-28.

EQUITY.

1. **REFORMATION OF INSTRUMENTS.** See **Deeds**, 2, 5.
2. **RESCISSION OF CONTRACTS.** See **Deeds**, 8.

3. TO EXCUSE DELAY IN FILING CLAIM. See Estates of Decedents, 5.
4. JURISDICTION : REMEDY AT LAW. See Injunction, 1.

ESTRAYS.

WHAT ARE NOT. See Animals, 2.

ESTATES OF DECEDENTS.

1. APPROPRIATION OF RENTS OF REAL ESTATE TO PAY DEBTS: CODE, SEC. 2403. Under the provisions of section 2403 of the Code, an executor or administrator, under the order and direction of the court, may apply the rents and profits of the decedent's real estate, accruing after his death, to the payment of debts and claims against the estate, in case the personal assets are insufficient; and the right to so take and apply rents and profits is not restricted to real property, possession of which is taken by the executor under section 2402 because there is no heir or devisee present and competent to take it. But before an order is made to so take and apply rents and profits, the heirs or devisees in possession should be made parties, and it should be made to appear that there is a necessity for such appropriation by reason of the insufficiency of the personal assets. (See opinion for a full discussion of the question by ROBINSON, J.) *Toerring v. Lamp*, 488.
2. COLLECTION OF ASSETS: OFFSETTING CLAIMS AGAINST DECEDENT. The deceased, before his death, became indebted to a corporation for shares of stock. The corporation rented real estate of the decedent, and the administrator in this action seeks to collect rent accrued since decedent's death. *Held* that the corporation could not offset its claim for stock, but that it must pay the rent in full, and file its claim for the stock, and accept therefor a due proportion of the funds available for the payment of the class of claims to which it belongs, in case there is not enough to pay such claims in full. (See opinion for citations.) *Id.*
3. CLAIM ON BOOK ACCOUNT: EVIDENCE. In an action to establish a claim on book account against the estate of a decedent, plaintiff's books were properly admitted in evidence, as well as his own testimony identifying the books and explaining charges by showing the dates thereof and the like. *Kilbourn v. Anderson*, 501.
4. ———: JUDGMENT: PRESUMPTION AS TO CORRECTNESS: Where the account in such action contained items not proper to be established by the books, and others not properly chargeable to the estate, but the judgment did not exceed the amount of the items properly proved and owing by the estate, this court will presume that the improper items were rejected by the trial court. *Id.*
5. CLAIMS AGAINST: STATUTE OF LIMITATIONS: EQUITABLE CONSIDERATIONS. Plaintiff, a resident of Massachusetts, seeks in this action to recover a claim against an estate in Iowa. Her claim was not filed within twelve months after the giving of notice of the administration, and hence is barred by section 2421 of the Code, "unless peculiar circumstances entitle plaintiff to equitable relief." As entitling plaintiff to such relief, she alleges that she did not know the law, but was informed by an attorney of her own state, soon after the death of decedent, that two years were allowed by the laws of Iowa for filing such claims, which information she believed and relied on; that she was not at that time able to employ counsel to prosecute her claim; that soon after the appointment of the administratrix she gave her actual notice by letter of her claim; and that the estate was solvent and unsettled. *Held* that these facts did not entitle plaintiff to equitable relief, and that a demurrer to her petition was properly sustained. *Roaf v. Knight*, 506.

6. DENIAL OF CLAIM PRESUMED. See Pleading, 4.

ESTOPPEL.

See ATTACHMENT, 4; JUDGMENT, 4; PARTITION, 3; SURETIES, 1; FORMER ADJUDICATION.

EVIDENCE.

1. BOOKS OF ACCOUNT: INTRODUCTION AGAINST OWNERS BY AGENT MAKING ENTRIES. In an action against defendant by plaintiff, who had been its secretary and manager, defendant's books of original entry were admissible against it, even though some of the entries therein were made by plaintiff; for they were made by him as defendant's agent. *Cormac v. Western White Bronze Co.*, 32.
2. ADMISSIONS OF AGENT TO BIND PRINCIPAL. The statements and admissions of an agent are not admissible in evidence against the principal, unless they are made at the time of the transaction to which they relate, and such transaction is within the scope of the agent's employment. Accordingly, *held* that the statements of one of plaintiff's attorneys, made after the attachment in this case was sued out, were not admissible as against plaintiff to show malice in suing out the writ. *Empire Mill Co. v. Lovell*, 100.
3. IRRELEVANT BUT HARMLESS. A cause will not be reversed for error in admitting irrelevant evidence, when it appears that no possible prejudice could result therefrom to appellant. *Id.*
4. ERROR WITHOUT PREJUDICE. The admission of irrelevant evidence is no ground for reversal where it appears that appellant was not prejudiced thereby. *Seska v. Chicago, M. & St. P. Ry. Co.*, 137.
5. ADMISSION: ERROR WITHOUT PREJUDICE. There is no prejudicial error in admitting evidence when the fact which it tends to prove is established by other competent and uncontradicted evidence. *Bartlett v. Fireman's Fund Ins. Co.*, 155.
6. ERROR WITHOUT PREJUDICE. The admission of incompetent evidence is not prejudicial when it tends only to prove a point admitted, nor when a statement proved thereby could not reasonably be regarded by the jury as relating to the point in issue. (See opinion for illustrations.) *Key v. Des Moines Ins. Co.*, 174.
7. ERROR IN ADMITTING: CURED BY CHARGE OF COURT. Error in admitting improper evidence is cured by an instruction which withdraws it from the consideration of the jury. *Shepard v. Chicago, R. I. & P. Ry. Co.*, 54.
8. NOT RELEVANT TO ISSUE. Where a case turns upon one single question of fact, evidence not relevant thereto is properly excluded. *White v. Adams*, 295.
9. DEPOSITIONS: USE OF BY AGREEMENT. Prior to the first trial in this case the parties entered into a written agreement that the deposition of plaintiff, already taken, might be used in evidence on the trial of the cause. But plaintiff was present and testified in person at that trial. At the second trial, however, plaintiff was absent, and the court, against defendant's objection, admitted the deposition. *Held* that this was justified by the agreement. *Nelson v. Chicago, M. & St. P. Ry. Co.*, 405.

10. **DEPOSITIONS: ERROR OF NOTARY: NO PREJUDICE.** Where the question to witnesses whose depositions were taken was, "In whose care was the car-load sent," but the notary inadvertently wrote it "In whose car," and the answer was that certain persons ordered the car, *held* that the error was not prejudicial, since there was no controversy as to the person in whose care the car was sent, and it was not incompetent to inquire who ordered the car. *Richmond v. Sundburg*, 255.
11. **SALE: EVIDENCE AS TO OWNERSHIP OF PROPERTY.** In an action for the price of a car-load of poultry shipped to defendants, where defendants denied plaintiff's ownership of the poultry, and claimed that they had bought it of a third person, the testimony of one of the plaintiffs as to a purchase of part of the poultry from such third person, and as to such person's indebtedness, was competent and material as showing plaintiff's title; and in such case there was no error in admitting the bill of lading and the live-stock contract, as they tended to show to and by whom the shipment was made; nor was there any error in admitting the testimony of one of plaintiffs as to who ordered the car; why the third person went with the car; what authority he had to settle for the car; that defendants never paid him for the poultry; and that they had made no remittance to plaintiffs for it. *Id.*
12. **IMPEACHING WITNESS BY LETTERS.** One who is a mere witness in a case cannot be impeached by letters written by him, but which have not been called to his attention when on the stand. *Id.*
13. **LETTERS FROM THIRD PERSONS.** Letters and telegrams from persons not parties to the action, sent to defendants, relating to their former business, and not shown to have been known to the plaintiffs, nor to have any connection with the subject-matter of the action, are not admissible in evidence. *Id.*
14. **ADMISSIONS IN ANSWER.** A paragraph in an answer which is an independent and distinct admission of material matters in the petition is admissible in evidence for plaintiff, where defendant introduces the rest of the answer. *Farley v. O'Malley*, 581.
15. **SECONDARY: FOUNDATION FOR: NOTICE TO PRODUCE PAPERS.** Plaintiff gave defendant timely notice to produce on the trial the original record of the meeting of its directors on a given date, including the record of a certain resolution material to the case, and informing defendant that if the original record was not produced, parol evidence of its contents would be introduced at the trial. *Held* that this was sufficient foundation, upon a failure to produce the original, to justify the introduction of a copy of the record in question, which a witness, a former officer of defendant, and who showed that he was familiar with the original record of the resolution named in the notice, testified to be a true copy of it. (See *Greenough v. Sheldon*, 9 Iowa, 506.) *Gafford v. American Mortgage & Investment Co.*, 736.
16. **RECORD OF TOWNSHIP CLERK: ORIGINAL PAPERS LOST.** The appraisement of damages caused by trespassing animals, made by the township trustees and filed with the township clerk, having been lost, and that fact shown, *held* that the record of the original, made by the clerk, was properly admitted as evidence for defendant, though the clerk testified that he might have given the original to a former attorney of defendant, who had since died,—there being nothing to show that it was received by such attorney on behalf of defendant. *Lyons v. Van Gorder*, 600.

17. **PAROL TO AFFECT WRITING : RULE STATED AND APPLIED.** Parol evidence is admissible when necessary to understand or apply the language of a written contract, but not when it is sought thereby to establish a contract at variance with the writing. (See opinion for citations.) Accordingly, where a written assignment read as follows : "I * * * do hereby sell, assign and transfer to * * * all my right, title and interest and claim to a mechanic's lien, as set forth and claimed by me in the above-entitled suit," and a collateral contract read : "It is understood that the assignment does not include [certain] subsidy notes," *held* that parol evidence might have been admitted (if necessary) to show the relation of the subsidy notes to the claim for a mechanic's lien,—as that they were held as collateral security for a part of it,—but was not admissible to show that the notes were a part of the claim assigned, and that they were excepted from the assignment,—which was absolute, and of the whole claim. *Bigelow v. Wilson*, 608.
18. **ORAL CONTRACT WITH ONE DECEASED.** One who is in the possession of real estate and claims to own it under an oral contract with a former owner, since deceased, may testify to the oral contract under which he claims, as against one who is seeking to subject it to the satisfaction of a judgment against an heir of the decedent. The judgment creditor in such a case is not one of the persons against whom section 8639 of the Code forbids such testimony. *Drake v. Painter*, 731.
19. **EVIDENCE OMITTED BY OVERSIGHT : PRESUMPTION IN FAVOR OF TRIAL COURT.** Where plaintiff, after resting his case, asked leave to introduce further evidence on the ground of oversight, and he was allowed to introduce it, this court will presume, in the absence of proof to the contrary, that the court found it to be a case of oversight or inadvertence, and so admitted the evidence under the statute authorizing its admission in such a case. *Randolf v. Town of Bloomfield*, 50.
20. **BALANCE : CORROBORATION.** The testimony of the parties hereto, as to the conditions of the contract between them, being substantially *in equilibrio*, their subsequent conduct in reference to the subject-matter of it is considered, and found to corroborate the theory of defendants. *Flower v. Cruikshank*, 110.
21. **TITLE TO HAY MADE ON LEASED LAND.** In an action to recover for the burning of hay made on leased land, plaintiff's title to the hay is shown, *prima facie*, when he has shown that he leased the land and made the hay, and was in possession of it at the time it was destroyed. He is not required, in the absence of an adverse claim to the hay, to prove the title of his landlord. *Johnson v. Chicago & N. W. Ry. Co.*, 666.
22. **EVIDENCE : CROSS-EXAMINATION.** Evidence elicited in cross-examination, and which is in no manner and to no extent connected with the evidence given by the witness upon his examination in chief, is properly stricken out. (See opinion for instance.) *McCormick Harv. Mach. Co. v. Jacobson*, 582.
23. **DECLARATIONS.** See Master and Servant, 2.
24. **RES GESTÆ.** See Master and Servant, 2.
25. **OF CONTRIBUTORY NEGLIGENCE.** See Master and Servant, 3; Railroads, 28, 81.
26. **BURDEN OF PROOF.** See Mortgages, 4; Pleading, 2, 11; Promissory Notes, 1, 2; Tax Sale and Deed, 5.

- 27. PAROL TO VARY WRITING. See Schools and School Districts, 1.
- 28. OF AGREEMENTS OF COUNSEL. See Practice in Supreme Court, 81.
- 29. TO PROVE STREET TO BE HIGHWAY. See Cities and Towns, 1.
- 30. OF SUPERFLUOUS AVERMENTS. See Banks and Banking, 1.
- 31. BOOKS OF ACCOUNT. See Estates of Decedents, 8.
- 32. TO PROVE FRAUD. See Fraud, 4.
- 33. TO REFORM OR RESCIND CONTRACT. See Deeds, 2, 3, 5; Vendor and Vendee, 5.

FOR EVIDENCE ON PARTICULAR SUBJECTS, see appropriate titles.

EXCEPTIONS.

See BILLS OF EXCEPTIONS, 1, 2; JUSTICES AND THEIR COURTS, 1.

EXECUTION.

- 1. EXAMINATION OF DEBTOR: ARREST UPON ORDER OF REFEREE. A referee appointed by the court to examine a judgment debtor for the discovery of property in a proceeding auxiliary to execution, under section 3135 of the Code, may issue an order for the appearance of the debtor (sec. 3146), and may afterwards, under section 3148, issue a warrant for the arrest of the debtor, upon the prescribed proofs being made. *Marriage v. Woodruff*, 291.
- 2. ———: IMPRISONMENT FOR CONTEMPT: CONSTITUTIONALITY. Chapter 8 of title 18 of the Code, providing proceedings auxiliary to execution, for the purpose of discovering the property of the execution defendant, is not repugnant to the constitution, in that it provides for the imprisonment for contempt of persons disobeying the order of the court, judge or referee therein, without trial by jury. (*Eikenberry v. Edwards*, 67 Iowa, 619, followed.) *Id.*
- 3. CONVERSION OF PROPERTY BY SHERIFF: PLEADING: INSTRUCTIONS: DAMAGES. In an action against a sheriff for the value of goods wrongfully taken on execution, though the petition only alleged a wrongful taking, instructions which implied a conversion of the goods were without prejudice to defendants, where their answer showed, and it was conceded, that the goods were taken and sold,—the damages in any case being the value of the goods, with interest. *Russell v. Huiskamp*, 727.
- 4. RESTITUTION OF PROPERTY TAKEN UNDER. See Homesteads, 5; Judgments, 6.
- 5. LEVY: ACTUAL NOTICE OF DEFECTIVE MORTGAGE. See Chattel Mortgages, 2.

EXEMPTIONS.

See HOMESTEADS.

FALSE PRETENSES.

AS GROUND FOR ATTACHMENT. See Attachment, 10.

FALSE REPRESENTATIONS.

See INSURANCE, 6-8; VENDOR AND VENDEE, 8.

FINES.

1. REMISSION OF. See Criminal Law, 22, 23.
2. IN JUSTICE'S COURTS : HOW MADE LIENS ON REAL ESTATE. See Intoxicating Liquors, 2.

FORCIBLE ENTRY AND DETAINER.

1. TRIAL OF TITLE : WHAT IS NOT. In an action of forcible detainer, where defendant had taken possession under a lease which had expired, he set up as a defense that he continued to hold possession under a written contract with plaintiff for the purchase of the land, with the terms of which he had complied on his part. *Held* that this was a concession that the title was in plaintiff, and did not raise an issue as to the title, but only as to the right of possession, and was not therefore forbidden by section 8620 of Code. (Compare *Oleson v. Hendrickson*, 12 Iowa, 222, and *Jordan v. Walker*, 52 Iowa, 647.) *Hall v. Jackson*, 201.
2. NOTICE TO QUIT : WHEN GIVEN. In order to maintain an action of forcible entry and detainer against a tenant holding over after the termination of his lease, the three days' notice to quit, required by section 8614 of the Code, need not be given after the termination of the lease. All that is required is that it be given three days before the suit is begun. In this case it was given one month prior to the expiration of the term, and the suit was brought the day after the term expired, and it was held sufficient. *McLain v. Calkins*, 468.
3. NOTICE NECESSARY TO ACTION. An action of forcible entry and detainer may be maintained against a tenant holding over after the termination of his lease, though the notice to quit, required by section 8614 of the Code, is given before the lease has expired. *Drain v. Jacks*, 629.

FORECLOSURE.

See MECHANIC'S LIENS, 1; MORTGAGES, 8-11.

FORMER ADJUDICATION.

1. DISMISSAL FOR WANT OF JURISDICTION. Decrees and judgments estop the parties thereto only when based on the merits of the case. Consequently, though there has been a decree against the plaintiff on the merits in an equity case in the district court, but upon appeal to this court the petition is dismissed on the ground that equity has no jurisdiction, the dismissal will be without prejudice to plaintiff's right to recover on the same cause in an action at law. *Keokuk & N. W. Ry. Co. v. Donnell*, 221.
2. NO BAR TO PROCEEDINGS UNDER CURATIVE ACT. An adjudication that the assessment and levy of a special tax by a board of supervisors was void for want of jurisdiction, is no bar to proceedings to assess and levy a tax for the same purpose under the provisions of an act of the legislature, framed with reference to such adjudication, and designed to validate the prior proceedings of the board in ordering the work for which the tax was designed to pay. *Richman v. Supervisors of Muscatine County*, 518.

See ATTACHMENT, 5; JUDGMENT, 2, 9; PARTITION, 1-4; TAX SALE AND DEED, 3.

FRAUD.

1. IN CONVEYING CHATTELS: EVIDENCE. Intervenor (a bank) claimed to own certain chattels attached by plaintiff as the property of defendant, alleging that defendant had conveyed the chattels to it in payment of his debt to it. *Held* that it was proper for plaintiff to demand a full disclosure of all the transactions between defendant and intervenor, in order that it might be determined whether there was an actual payment of intervenor's claim, and the purpose with which it was paid; and that answers of intervenor's president, which tended to throw some light on these matters, were properly admitted. *Deere v. Wolf*, 115.
 2. THE SAME. In such case it was proper to determine just what interest the bank had in the property, and to that end evidence of statements made by the president of the bank, after the alleged transfer of the property to it, to the effect that the property was held as security, was properly admitted. *Id.*
 3. THE SAME. In such case it was proper to show that the president of the bank had advised a creditor of defendant to garnish the bank, as this tended to show that the bank did not purchase the property. *Id.*
 4. THE SAME. In such case it was also proper to admit evidence tending to show the amount realized from the sale of the property, as tending to show its value, which might have some bearing on the good faith of the transaction. *Id.*
 5. DEGREE OF PROOF: INSTRUCTION. Fraud is established by the proof of circumstances which lead naturally and fairly to the conclusion of fraud; and a clause in an instruction in this case, which, in effect, told the jury that the proof must be such as to make the inference of fraud irresistible, was error, and it was not cured by the other language of the instruction. (Compare *McCreary v. Skinner*, 75 Iowa, 411; *Turner v. Younker*, 76 Iowa, 258.) *Russell v. Huiskamp*, 727.
 6. CONCEALMENT OF FACTS. See Mortgages, 3.
 7. IN OBTAINING TAX TITLE. See Tax Sale and Deed, 1.
 8. IN PURCHASING LAND FOR STREET. See Cities and Towns, 3-6.
- See CHATTEL MORTGAGES, 5; CORPORATIONS, 2; DEEDS, 3; FRAUDULENT CONVEYANCE; SPECIFIC PERFORMANCE, 1.

FRAUDULENT CONVEYANCE.

1. INNOCENT GRANTEEES. If the vendor of the property in this case be conceded to have transferred it with a fraudulent intent, *held* that the evidence fails to show any participation in, or knowledge of, that intent on the part of the vendee, and that its title cannot be set aside on that ground. *Burtis v. Humboldt County Bank*, 108.
2. HUSBAND TO WIFE: CONSIDERATION: EVIDENCE. A husband may discharge a *bona-fide* indebtedness to his wife by a conveyance of property to her, and neither prior nor subsequent creditors can question the transaction. (*Jones v. Brandt*, 59 Iowa, 332.) But such a transaction cannot be sustained without satisfactory evidence that actual contractual relations existed between the husband and wife with reference to her separate money or property, and the evidence on that point in this case is indefinite, confused and contradictory; and, upon consideration of the whole case, *held* that the property remained in equity in the husband, and was subject to his debts. *Romans v. Maddux*, 203.

3. VOID AS TO SUBSEQUENT CREDITORS. A conveyance not made in good faith and for a good consideration is voidable as to subsequent as well as to existing creditors. (See cases cited in opinion.) *Id.*
4. PREFERENCE OF CREDITORS: BADGE OF FRAUD: EVIDENCE. Debtors have the right to prefer creditors, and to secure them, and the fact that they are relatives makes no difference; but when a creditor, a relative of the debtor, seeking security, lends his aid so far as to become trustee for other creditors who are also relatives, but who are not expecting such favors, and are ignorant of the transaction, and the transaction is attended with other suspicious circumstances, it requires very satisfactory explanation, or it stands as a badge of unfair dealing. And, in consideration of the evidence in this case (see opinion), *held* that it justified the finding of the district court that the chattel mortgage in question, made by the debtors to their father-in-law to secure him and other relatives, to the exclusion of other and more distant creditors, was fraudulent, because its purpose was, in part at least, to delay and defeat other creditors. *Wise v. Wild*, 586.
5. VOLUNTARY IN PART: LIABILITY TO CREDITORS OF GRANTOR. Where the consideration of a conveyance made by a debtor was sixteen hundred dollars, and one thousand dollars only was paid, and in an action to charge the land with the debts of the grantor, it was claimed that he owed the grantee six hundred dollars, but it appeared that such debt, if it ever existed, was barred by the statute of limitations, and had been ignored by the parties in business transactions long before the conveyance in question, *held* that as to the six hundred dollars the conveyance should be considered voluntary, and constructively fraudulent, and that the land to that extent should be subjected to the grantor's debts, though the grantee was not a party to any actual fraud in attempting to delay or hinder the creditors of the grantor. *Gaar v. Hart*, 597.
6. EXCUSED BY IMBECILITY: RECOVERY. Plaintiff's intestate executed to defendant a promissory note without consideration, and secured by a chattel mortgage on his property, for the purpose of defrauding his creditors, but the evidence shows (GRANGER, J., *not concurring*) that he was of such weak mind and so unduly influenced by defendant that he was not chargeable in law with the ordinary consequences of such fraud. Defendant assigned the papers to M., to whom the maker paid the note in part, and he with the defendant and two others as sureties made a new note to M. for the balance. This note was put in judgment, and defendant and the two other sureties paid the judgment, each paying one-third. Plaintiff's intestate paid to each of the other two sureties the amount paid by him, and took from them an assignment of any claim they might have on account of such payment. *Held* that the plaintiff was entitled to recover such amounts of defendant. *Wiley v. Carter*, 751.
7. HUSBAND TO WIFE: CONSIDERATION: WIFE'S KNOWLEDGE. A wife had conveyed land to her husband under a parol agreement, as they testified, that he would, at any time when requested by her, deed back the property or any other property they might have. Afterwards, and, as they testified, in consideration of this agreement, he conveyed to her the property which, in this action, a creditor of the husband seeks to subject to the payment of his debt. The debt had been contracted prior to the conveyance, and it was for money collected and misappropriated by him without plaintiff's knowledge. The evidence (see opinion) shows that the husband's purpose in making the conveyance was to delay and defeat his creditors, and that the wife had knowledge of that purpose. *Held* that she could not hold the property as against plaintiff's claim. *Wasson v. Millsap*, 762.

8. NOTICE OF BY RECORDING DEED. See Statute of Limitations, 3, 8.
See FRAUD, 1-4.

GARNISHMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; SALES, 4.

GIFTS.

1. EXECUTED: WHAT IS NOT: ENDORSEMENT ON NOTE. A father held his son's note and a mortgage on his land as security. At one time he made an endorsement on the note as of a sum paid thereon, but there was no payment, and the intention of the father was to make him a gift of the amount. The endorsement and the father's intention were not made known to the son, but afterwards the father bought the mortgaged land of the son, applying the full amount of the note in part payment. He still retained the note and mortgage as a lien against the land, and afterwards assigned them to plaintiff, having first erased the endorsement. *Held*, as against junior lien-holders, in an action to foreclose the mortgage, that there was no executed gift to the son, and that plaintiff was entitled to judgment for the full amount of the note. *Gray v. Nelson*, 68.
2. GIFT INTER VIVOS: WHAT IS NOT. See Trusts, 8.

GRAND JURORS.

QUALIFICATION: NUMBER NECESSARY TO INDICT. See Criminal Law, 1-3.

GUARANTY.

1. OF NOTES SIGNED WITH FICTITIOUS NAMES: REASONABLE DILIGENCE AS DEFENSE. The agents of the plaintiff for the sale of their goods, by the contract of agency, guaranteed all notes taken for goods to be good when taken. They took the notes in suit, signed with fictitious names, and the persons who so signed them were insolvent at the time. *Held* that reasonable diligence on the part of the agents in taking the notes, while it might relieve them from responsibility on account of the deception practiced by the makers in signing fictitious names, would not discharge them from liability on their guaranty, and that an instruction which in effect held that it would was erroneous. *Springfield Engine, etc., Co. v. Van Brunt*, 82.
2. DISCHARGE BY SETTLEMENT: INSTRUCTION. In such case, the agents pleaded a settlement as discharging them from liability on their guaranty, but plaintiff replied that if there was a settlement as to the notes in question it was made in ignorance of the facts concerning the notes, and in the belief, founded upon the representations of the agents, that the names subscribed to the notes were genuine, and that the makers were solvent; and there was evidence tending to support the reply. *Held* that if the reply was true it constituted a good defense to the settlement, and that an instruction to the jury, that if they found there was a settlement they should find for defendant, was erroneous. *Id.*

GUARDIANS.

1. ASSIGNMENT OF NOTE AFTER WARD'S MAJORITY. An assignment by a guardian, executed after his ward's majority, of a note made to the guardian for money due the ward, is valid, in an action by the assignee to collect the note, in the absence of any objection by the ward. *Hippee v. Pond*, 235.

2. FRAUDULENT DEED BY. See Statute of Limitations, 8.

HIGHWAYS.

1. NON-USER AND ADVERSE POSSESSION: STATUTE OF LIMITATIONS. In 1864 a highway was established through land now owned by defendant. It was never opened, and what travel there was that way was over the adjacent land. Defendant and those under whom she claims have had actual, open, notorious and adverse possession for more than ten years. *Held* that the right of the public to the highway was extinguished, and that defendant had a right to extend her fences so as to hinder travel along the line of said road and across her adjacent lands. (*Davies v. Huebner*, 45 Iowa, 574, *distinguished.*) *Orr v. O'Brien*, 253.
2. ESTABLISHMENT: APPEAL: NOTICE: JURISDICTION. The provision of section 959 of the Code, providing that if a highway is established on condition that the petitioners therefor pay the damages allowed, notice of appeal by one claiming damages must be served on the four persons first named in the petition for the highway, if there are so many who reside in the county, is mandatory, and without such service the district court has no jurisdiction to entertain the appeal. It is immaterial whether or not such persons are interested in the appeal. *Finke v. Zeigelmiller*, 251.

HOMESTEADS.

1. ABANDONMENT: EVIDENCE. What other persons may have said as to the intention of the owner of a homestead to return to it, and what one who purchases it at execution sale believes about it when he purchases, cannot be admitted in evidence against the owner to prove an abandonment. *Jones v. Blumenstein*, 861.
2. ABANDONMENT: WHAT IS NOT. The absence of a widow from her homestead for eight months to live with and visit her daughter, and care for her during confinement,—the property in the meantime being rented, but the owner's furniture being left therein, except such articles as she desired to take with her for use,—does not constitute an abandonment, in the absence of any evidence of her intention not to return. (See cases cited in opinion.) *Id.*
3. CEASING TO BE HEAD OF FAMILY: WHAT IS NOT. A widow occupying a homestead does not cease to be the head of the family, and therefore lose her right to the homestead, by the fact that her married daughter and her husband are taken into the house and reside with her. *Id.*
4. PURCHASE AT SHERIFF'S SALE: CAVEAT EMPTOR: ESTOPPEL. One who purchases a homestead during the owner's absence, knowing that it has long been the homestead, and that the owner has left a part of her furniture in the house, cannot claim that he was so misled by her absence as that she should be estopped from asserting her homestead right. The doctrine of *caveat emptor* applies to such a purchase. (See opinion for citations.) *Id.*
5. EXECUTION SALE VACATED: PURCHASER'S RIGHT AS AGAINST EXECUTION CREDITORS. Where a homestead was sold in satisfaction of judgments which were not liens on it, and the sale was vacated, the purchaser was not entitled to have assigned to him the judgments which were paid with the purchase money, but he was entitled to have the money refunded to him, with interest, by the judgment creditors who received it. (See Code, sec. 8090.) *Id.*

6. **ALIENATION: ORAL CONTRACT CONSUMMATED BY ABANDONMENT.** Plaintiff, a married woman, after having furnished her mother's house, under an oral contract with her mother and her mother's husband, took possession of it with her family, and thereafter supported her mother and her mother's husband therein, in consideration of the property becoming hers at her mother's death. It had been the mother's homestead. *Held* that when plaintiff took possession it became her homestead,—the mother and her husband abandoning it in consummation of the contract,—and that the performance by plaintiff of her oral contract gave to her the right and equity to the property, notwithstanding section 1990 of the Code, requiring the husband and wife to concur in and sign the same joint instrument in order to convey their homestead. *Druke v. Painter*, 781.

HUSBAND AND WIFE.

PREGNANCY OF WIFE WHEN MARRIED: HUSBAND'S DISCHARGE FROM LIABILITY. See Promissory Notes, 2.

See DIVORCE, 1; FRAUDULENT CONVEYANCE, 2, 7.

IMPRISONMENT.

FOR CONTEMPT OF COURT. See Executions, 2.

INDICTMENT.

1. **VALIDITY OF.** See Criminal Law, 2, 3.
2. **REQUISITES OF.** See Criminal Law, 10, 11.

INJUNCTION.

1. **OF AD QUOD DAMNUM PROCEEDING: ADEQUATE REMEDY AT LAW.** Defendants began an *ad quod damnum* proceeding against plaintiff to recover the value of certain land occupied in the construction of plaintiff's road. Plaintiff in this action sought to enjoin defendants from prosecuting that action on the grounds that defendants had conveyed the right of way to another company, and that plaintiff had become possessed of that company's right through the foreclosure of a mechanic's lien; that plaintiff had paid defendants for the right of way; that defendants' right to sue for the value of the land was barred by the statute of limitations: and that they were estopped by the judgment in the mechanic's lien case, and by their own acts, from prosecuting that suit. *Held* that all questions raised by these issues, as well as the question whether the right of way had been lost by abandonment, could be raised and tried in the *ad quod damnum* proceeding, which is an adequate remedy at law, and that, therefore, equity had no jurisdiction to grant the injunction. *Keokuk & N. W. Ry. Co. v. Donnell*, 221.
2. **ATTORNEY'S FEES FOR DEFENDING: RECOVERY IN ACTION ON BOND.** Expenses necessarily incurred for attorney's fees in defending against an injunction wrongfully sued out may be recovered in an action on the injunction bond, but such damage does not include expenses in defending against other features in the case in which the injunction was issued. And although, as in this case, the prayer is for an injunction, "and such other and further relief as petitioner is entitled to," yet, if the allegations of the petition do not entitle the plaintiff to any other relief than injunction, and the injunction is dissolved on final hearing, the injunction defendant may recover his attorney's fees in an action on an injunction bond. (Compare *Langworthy v. McKelvey*, 25 Iowa, 49, and *Carroll County v. Railroad Land Co.*, 53 Iowa, 685. *Thomas v. McDanel*, 299.

8. DECREE NOT WARRANTED BY PLEADINGS AND EVIDENCE: WATERS: APPEAL. Plaintiffs in this action sought to enjoin defendant from damming and polluting the water of a stream. The real grounds of their action were that defendant had no right to dam the stream, and that he had no right to permit hogs to have free access to it. The court rendered a decree enjoining the defendant "from so damming or obstructing the natural flow of the water in the creek as that the same shall become stagnant and foul in any manner, so that the water shall be unwholesome for plaintiffs' stock." *Held*—
 - (1) That this was an adjudication in defendant's favor that he had a right to dam the stream, and must be taken as the law of the case as against plaintiffs, since they do not appeal.
 - (2) That since defendant had the right to dam the stream, and plaintiff did not complain of an abuse of that right resulting in the pollution of the water, but attributed the pollution to the fact that hogs were permitted to have access to it, and the evidence followed that theory, the decree restricting the right to dam was not warranted either by the pleadings or the evidence. *Spence v. McDonough*, 460.
4. IN AID OF QUO WARRANTO. In a civil action in the nature of *quo warranto* to test official rights, brought by the county attorney in the name of the state, a preliminary injunction should not be issued restraining the defendants from performing the functions of their office. *State v. Simpkins*, 676.
5. TO PREVENT UNLAWFUL EXPENDITURE OF PUBLIC MONEY. See Counties, 2.
6. OF SALOON NUISANCES. See Intoxicating Liquors, 6-11.

INNOCENT PURCHASER.

See FRAUDULENT CONVEYANCE, 1; SPECIFIC PERFORMANCE, 1; VENDOR AND VENDEE, 10.

INSTRUCTIONS.

1. STATING ISSUES. Where the third division of the answer was substantially embraced in the second, it was not necessary to extend the statement of the issues beyond the second division. *Richmond v. Sundburg*, 255.
2. REFERRING TO PLEADINGS. The court directed the jury to find for plaintiffs unless they found that the signature of the defendant was obtained by fraud "as alleged in the answer." *Held* that this reference to the answer was not error, because the substance of the answer had been stated in a previous instruction, to which the jury was referred by the language used. *Probert v. Anderson*, 60.
3. EVIDENCE TO WARRANT. Action on a note alleged to have been given to plaintiff to induce him to live with his wife, notwithstanding the fact that she was, without his knowledge, pregnant by another man at the time of marriage. The court instructed the jury as to their duty in case they found that the note was given by defendant "by reason of the woman having been brought up in his family." It was objected that there was no evidence warranting the instruction; but *held* that, while there was no direct evidence that the note was given for that reason, there was evidence (see opinion) from which the jury might reasonably infer that such reason was not without weight in inducing defendant to make the note, and that therefore the instruction was not erroneous on the ground urged. *Brannum v. O'Connor*, 632.

4. **NOT WARRANTED BY PLEADINGS: NO PREJUDICE.** In an action upon two promissory notes, the defendant pleaded that they were not yet due, on the alleged ground that he had, for a valuable consideration, made an agreement with plaintiff's agent for an extension of time of payment, and that the agent in making said agreement acted with the full knowledge and consent of plaintiff. There was no plea of subsequent ratification, but there was some evidence tending to show a ratification. *Held* that it was error to submit the question of ratification to the jury, but that it was an error favorable to defendant,—since it gave him the benefit of the evidence on that point,—and was no ground of reversal on his appeal. *Miller v. Root*, 545.
5. **NO EVIDENCE: IMMATERIAL QUESTION.** The court properly refused in this case to allow the jury to pass on the question of agency, because there was no evidence tending to establish the alleged agency, and under the evidence the question was immaterial. *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 585.
6. **ERROR WITHOUT PREJUDICE.** Plaintiff in his reply pleaded an estoppel, but the evidence did not tend to support it, yet the court submitted the question to the jury. But the only effect of the estoppel, if it had been proved, would have been to establish a fact which was otherwise fully established. *Held* that the submission of the question could not have prejudiced defendant, no matter how the jury found upon it. *Bartlett v. Fireman's Fund Ins. Co.*, 155.
7. **ERROR WITHOUT PREJUDICE.** An instruction which requires plaintiff to establish facts which the statute says shall be regarded as true, cannot be prejudicial to defendant, though there is no evidence of the facts referred to in the instruction. (See opinion for illustration.) *Key v. Des Moines Ins. Co.*, 174.
8. **REFUSAL: ERROR WITHOUT PREJUDICE.** The refusal to give an instruction, which in a strained but conceivable view of the case ought to have been given, is not reversible error. The court may trust somewhat to the common sense of the jurors. *West v. Chicago & N. W. Ry. Co.*, 654.
9. **REFUSAL TO GIVE: NO PREJUDICE.** Although an instruction asked is correct, there is no prejudice in refusing it when another is given on the same point equally, if not more, favorable to the asking party. *Andrews v. Mason City & Ft. D. Ry. Co.*, 669.
10. **SPECIAL INTERROGATORIES: FAILURE TO ANSWER.** A failure on the part of the jury to answer special interrogatories is not necessarily a ground for setting aside the verdict, when they do not call for facts without which the verdict cannot be sustained. *Id.*
11. **SPECIAL INTERROGATORIES: WHEN PROPERLY REFUSED.** Special interrogatories to the jury are properly refused when they are not relevant to any issue in the case; and when they inquire about matters of which there is no evidence; and when they are such that no possible answer which could be given to them could control the general verdict, in the absence of other special findings. (See opinion for applications of the rule.) *Cormac v. Western White Bronze Co.*, 82.
12. **SPECIAL INTERROGATORIES: WHEN PROPERLY REFUSED.** Special interrogatories submitting questions not relevant to the issue are properly refused, and so are such as call for an answer to the ultimate fact in issue. (See opinion for application of rule.) *White v. Adams*, 295.

13. **SPECIAL INTERROGATORIES : ERROR IN REFUSING : CURED BY OTHER FINDINGS.** There is no prejudice from refusing special interrogatories asked, when the information sought to be elicited thereby is substantially given in special findings on other interrogatories submitted. *Joy v. Bitzer*, 78.
14. **SPECIAL INTERROGATORY : SUBMISSION TO COUNSEL.** Special interrogatories submitted on the court's own motion need not be submitted to the inspection of counsel. (See *Clark v. Ralls*, 71 Iowa, 189.) *Briggs v. McEwen*, 808.
15. **REPETITION NOT REQUIRED.** Where the instructions given by the court on its own motion state plainly, fully, concisely and fairly the issues to be determined, and the law applicable thereto, it is not error to refuse other instructions asked. *Richmond v. Sundburg*, 255.
16. **ERROR IN FAVOR OF APPELLANT.** An appellant cannot be heard to complain of an erroneous instruction when the error is in his own favor. *Deere v. Wolf*, 115.
17. **MUST BE CONSIDERED TOGETHER.** All the rules of law upon a subject material to a cause need not be given in one instruction. It is sufficient if they are fully and clearly given in the whole charge. *Id.*
18. **NOT ASKED FOR BY APPELLANT.** An appellant cannot be heard to complain of the failure of the court to give in an instruction a rule of law not asked for by him, when the rule does not seem necessary for a correct determination of the case. *Id.*
19. **FRAUD : CONSPIRACY : PLEADING.** Where the answer to a petition of intervention, claiming attached property on the ground of a prior purchase, alleged that the purchase was void on account of the fraudulent purpose of all the parties participating therein, *held* that this was a plea of fraud, and not of conspiracy, and that an instruction taking all question of conspiracy from the jury, on account of the want of evidence, did not take away the issue of fraud, and render erroneous further instructions on that issue. *Id.*
20. **AS TO BURDEN OF PROOF : CONFLICT.** The court, having clearly instructed the jury that the burden of proof was upon the defendant, told them in the next instruction that the only question was, Were the patterns made as ordered by defendant? and then proceeded to say : "If you find by a fair preponderance of the evidence that they were so made, then your verdict should be for the plaintiff, but if not, then your verdict should be for defendant." *Held* that, taking the instructions together, the jury must have clearly understood that the burden was on defendant to show that the patterns were not made as ordered by him, and therefore there was no substantial conflict. *White v. Adams*, 295.
21. **—— : WHEN NOT REQUIRED.** When there is no conflict in the evidence as to the only issue of fact involved, there can be no error in refusing to instruct as to the burden of proof. And, in this case, where the only issue was whether defendant had been employed by plaintiff for sixty-five or seventy-five dollars per month, and defendant testified that he told plaintiff that he would not work for less than seventy-five dollars, and that plaintiff told him to go on, and he would make it all right, and plaintiff testified, after giving his version of the transaction, that he would not swear that he had not made the statement attributed to him by defendant, *held* that the issue was established for defendant without conflict. *Smith v. Kegley*, 475.

22. **AS TO FACTS GENERALLY KNOWN.** The price of mowers at a certain time, and the condition of the weather and of the roads, are not facts resting in the knowledge of all men, and of which a jury may take notice without evidence; and an instruction to the contrary effect was properly refused. *McCormick Harv. Mach. Co. v. Jacobson*, 582.
23. **NOT JUSTIFIED BY PLEADINGS OR EVIDENCE.** See Master and Servant, 1.
24. **EXCEPTIONS TO : WHEN TO BE TAKEN.** See Practice and Procedure, 7.

FOR INSTRUCTION ON PARTICULAR SUBJECTS, see appropriate titles.

INSURANCE.

(1) *Insurance Companies.*

1. **DOING UNLAWFUL BUSINESS : REMEDY.** Defendant is an insurance company organized under the laws of New York, and is alleged in the petition to have a certificate from the auditor of state authorizing it to do business in Iowa, but to be violating the laws of Iowa by making more than one of certain kinds of insurance. *Held* that *quo warranto* was the proper remedy, under section 3345 of the Code, to test its right to continue to transact such business, and not *certiorari* to review the act of the auditor in granting the certificate. (See opinion for statutes and cases cited and considered.) *State v. Fidelity & Casualty Co.*, 648.
2. ——— : **FOREIGN COMPANY : IOWA'S RETALIATORY STATUTE : INTERPRETATION AND ENFORCEMENT.** Section 1154 of the Code provides : "When by the laws of any other state any * * * prohibitions are imposed, or would be imposed, on insurance companies of this state doing, or that might seek to do, business in such other state, * * * so long as such laws continue in force the same * * * prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business within this state, * * *." The defendant is an insurance company of the state of New York, by the laws of which state all insurance companies, including those of Iowa, are prohibited from making more than one of several kinds of insurance in that state. But the defendant was doing business in this state, and making all of said kinds of insurance here. *Held* that it was violating the said section, and was liable to be restrained in an action of *quo warranto*, without alleging or showing that the state of New York had ever actually enforced its law against an Iowa company which was attempting to violate it. The existence of the law there is sufficient to put its prohibitions in force here, through the section above quoted. Nor does it make any difference that Iowa companies are prohibited by the laws of Iowa from making more than one of the said kinds of insurance in Iowa. The only question is,—does New York impose prohibitions on Iowa companies? If so, the same prohibitions are imposed in return as against New York companies. *Id.*

(2) *Fire, etc., Insurance.*

3. **ACTION ON POLICY BY MORTGAGEE : PLEADING.** The policy in question was issued to plaintiff's husband upon property on which she held a mortgage, and the loss, if any, was made payable to mortgagees. She was the only mortgagee at the time of the fire, and after the fire he transferred the lot on which the insured building stood to her in consideration of the amount due on the

mortgage, and afterwards the mortgage was cancelled. *Held* that she had a right of action on the policy as a mortgagee, and that she was not divested of that right by the purchase of the lot and the cancellation of the mortgage, and that it was not necessary for her to state in her petition the facts relating to the transfer of the property after the fire. *Bartlett v. Iowa State Ins. Co.*, 86.

4. NO PROOF OF LOSS : WAIVER : EVIDENCE. In this action on a policy of insurance against damage by lightning, it appears that there was no proof of loss (see same case, 71 Iowa, 337), but plaintiff alleged a waiver of such proof, but the evidence (see opinion) does not tend to establish such waiver, but the contrary. *Held* that the court erred in refusing to direct a verdict for defendant. *Welsh v. Des Moines Ins. Co.*, 376.
5. BREACH OF POLICY BY ADDITIONAL INSURANCE : NOTICE AND CONSENT : EVIDENCE. The defendant issued to plaintiff a policy of fire insurance for fifteen hundred dollars on a certain building, and the policy permitted other insurance to the extent of fifteen hundred dollars, and provided as follows : "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, this policy shall be void;" also, "The managers of the company at Chicago are alone authorized to make any change or grant any privileges under this policy, and any endorsement or agreement varying the contract, made by any agent or sub-agent of the company, is void." On the policy were endorsed the words : "DUCAT and LYON, Managers, Chicago, Ill." At the time the policy was issued there were two other policies in force upon the building, one for fifteen hundred dollars, and the other for two thousand dollars, of which the company's agent who transacted the business had notice; but it was the understanding that the two thousand dollars should be cancelled, which, however, was never done. The fifteen-hundred-dollar policy expired a short time after the policy in question was issued, and plaintiff secured the same amount of insurance in another company. After doing this he notified the agent of defendant, through whom he had secured defendant's policy, of that fact, and said : "Shall I notify the companies, or will you?" This agent was also the agent for the company which carried the two-thousand-dollar risk. There was no evidence that plaintiff ever sought or secured, either through the local agent or the managers at Chicago, permission to carry more than fifteen hundred dollars additional insurance, and the property was burned before any additional premiums had been paid to defendant. In an action on the policy, *Held*—
 - (1) That the failure or inability to get the two-thousand-dollar policy cancelled according to the understanding did not operate as a permission from defendant to carry it in excess of the amount allowed by its policy, and that by carrying the excess the policy was rendered void.
 - (2) That there was no evidence to be submitted to the jury on the question whether the defendant had consented to the excessive insurance, and that the court properly directed a verdict for defendant. *Zimmerman v. Home Ins. Co.*, 685.
6. BREACH OF CONDITION AS TO OWNERSHIP : POLICY VOID. The policy in question provided : "If the interest of the assured in the property be any other than the entire, unconditional, sole ownership of the property, for the use and benefit of the assured, it must be so expressed in the written part of this policy; otherwise the policy shall be void." The policy was issued to G. The property belonged to H., but that fact was not stated in the policy. *Held* that it was void *ab initio*, and that neither G. nor H. could recover thereon. *Henning v. Western Assur. Co.*, 319.

7. **OWNERSHIP OF PROPERTY: VERDICT AGAINST EVIDENCE.** Where the court instructed the jury that plaintiff could recover only upon condition that he was the absolute owner of the property insured and destroyed, and it appeared by plaintiff's own affidavit, and by other testimony, that plaintiff held the property only as collateral security, though under a bill of sale, a verdict for plaintiff was contrary to the evidence and instructions, and should have been set aside. *Id.*
 8. **FALSE STATEMENTS AS TO ENCUMBRANCE: KNOWLEDGE OF AGENT.** The property insured in this case was held by plaintiff under a title bond, on which plaintiff had paid some interest, but none of the principal, and the interest so paid, and the money expended for the insured building, was the extent of the plaintiff's interest in the property. Defendant's soliciting agent was, at the time of taking the application, informed of these facts, but it was his opinion that they created no encumbrance on the property, and in accordance with that opinion plaintiff stated in the application that the property was not encumbered. *Held* that the knowledge and conduct of the agent bound the company, and that it could not avoid liability on the policy on account of the false statements in the application, although the policy provided that any such false statement should render it void. (See cases cited in opinion.) *Key v. Des Moines Ins. Co.*, 174.
 9. **ADJUSTMENT OF LOSS UNDER MISTAKE: EVIDENCE.** Defendant claimed that its agent adjusted the loss in question, believing that the property was free from encumbrance, when it was not; and it now seeks to avoid paying the loss on that ground. *Held* that it was proper to admit evidence tending to show that the adjusting agent's attention was called to the encumbrance before he adjusted the loss. *Id.*
 10. **ADMISSION OF AGENTS: WHEN BINDING ON COMPANY: EVIDENCE.** Defendant's agent was empowered to adjust and pay the loss in question if defendant was liable. While acting within the scope of his authority, and with reference to the loss in question, he admitted that the defendant would be liable but for the existence of a certain mortgage upon the property when the policy was issued. *Held* that these admissions were binding on defendant, and that it was competent to prove them against defendant to establish plaintiff's claim (denied by defendant) that defendant had assumed the risk by an agreement with the company which issued the policy. *Bartlett v. Fireman's Fund Ins. Co.*, 155.
 11. **AGREEMENT TO REINSURE: STATUTE OF FRAUDS.** The statute of frauds has no application to a contract entered into by one insurance company with another, whereby the first company assumes absolutely the risks taken by the second one. It is not a contract to answer for the debt or default of another. *Id.*
 12. **PROVISION AGAINST MORTGAGE: WAIVER BY AGENT.** If an agent who takes a risk of fire insurance knows at the time that the property is mortgaged, it is a waiver for the company of a clause in the policy that it shall be void if the property is encumbered. *Id.*
- (8) *Accident Insurance.*
13. **NON-PAYMENT OF PREMIUM INSTALLMENTS: FORFEITURE: NOTICE: WAIVER.** M. was an employe of a railroad company, and he procured of defendant an accident insurance policy payable to his wife, the plaintiff. The policy insured him for four consecutive periods of two, two, three and five months, respectively, from April 21, 1887, and to pay the premiums he gave to defendant an

order on the railroad company for the payment of five dollars out of his wages for each of the months of May, June, July and August, 1887, and it was expressly provided in the contract that each of the four payments was to be applied only to its corresponding insurance period, and that "all claims for injuries effected during any period for which its respective premium has not been actually paid shall be forfeited to the company." The railroad company received the order and placed it on file as a voucher, and paid the five dollars out of M.'s wages for the month of May, but it never formally accepted the order. The defendant, on or before June 21, demanded of the railroad company the five dollars for that month, but payment was refused on the ground that M. was no longer in that company's employment, but he was in fact in its employment, though on another division, and he drew all of his earnings for the month of June; and on the twenty-ninth of that month he wrote to the defendant to cancel his policy, as he did not wish to carry it longer. Defendant did not, however, cancel the policy nor return the order to M. On the eighteenth of July following M. was killed by an accident, and plaintiff drew all the wages due him. *Held—*

- (1) That the order on the railroad company did not amount to a payment of the premium, and that M. was insured only for the first period of two months, for which the premium was actually paid; which time expired prior to his death.
- (2) That since M. had directed the cancellation of the policy, and drew all his wages for the month of June, it is evident that he intended to terminate it, and considered it no longer in force, and that he had actual notice that the payment of the premium for June had not been made. Hence the plaintiff has no ground to complain that defendant did not notify him of the railroad company's failure to make the second payment.
- (8) That defendant's right to claim a forfeiture was not waived by its failure to cancel the policy and return the order; for, had the cancellation been waived, and M. lived, and the third payment been made, the policy would have been in force, by its terms, during the third period, regardless of its condition during the second. *McMahon v. Traveler's Ins. Co.*, 229.

INTEREST.

ON PAYMENT DELAYED BY LITIGATION. The payment of plaintiffs' mortgages was delayed by defendant's resistance. They provided for interest. *Held* that interest at the stipulated rate was properly allowed pending the litigation. *Stickney v. Stickney*, 699.

INTER-STATE COMMERCE.

See INTOXICATING LIQUORS, 1.

INTOXICATING LIQUORS.

1. SALE IN ORIGINAL IMPORTED PACKAGES : PROHIBITION BY STATUTE : CONSTITUTIONALTY. Defendant was sought to be enjoined from maintaining a nuisance by keeping a place for the unlawful sale of intoxicating liquors. He purchased the liquors sold by him—beer and whiskey—in other states. They were put up in bottles securely sealed. The beer was packed and shipped in cases containing a certain number of bottles, and defendant sold beer in such original cases only. The whiskey was also put up in quart and pint bottles, securely sealed, each of which was enclosed in a pasteboard box,

and then packed and shipped in boxes and barrels. These bottles were sold by defendant in such numbers as his customers desired, but in no case was a part of a bottle sold. *Held* that the sales of both beer and whiskey, as thus conducted, were in violation of the statutes of Iowa, and subjected the defendant to punishment for nuisance, and that such construction of the statute did not render it obnoxious to that provision of the constitution of the United States vesting in congress the right to regulate commerce between the states. (See opinion for cases cited.) *Collins v. Hills*, 181; *Grouse v. Howat*, 187.

2. **UNLAWFUL SALE: FINES IN JUSTICES' COURTS: HOW CHARGED ON REAL ESTATE.** Judgments for fines and costs rendered in justices' courts in prosecutions for the violation of the prohibitory liquor law are not in any case liens on the real estate used for the unlawful sales, but may be made such in proper cases, by filing transcripts in the office of the clerk of the district court (Code, secs. 3567, 3568, 4609); and the district court has no authority, in an action brought for that purpose, to declare such a judgment, of which no transcript has been filed, a lien on real estate, and to direct the same to be sold for its satisfaction. *State v. McCulloch*, 450.
3. **UNLAWFUL SALES BY PHARMACIST: VERDICT AGAINST EVIDENCE.** Defendant, a registered pharmacist, having a permit to sell intoxicating liquors for the actual necessities of medicine only, was found guilty of abusing his trust in selling such liquors when he had reason to believe that they would be used as a beverage. But, upon examination of the evidence (see opinion), *held* that there was no evidence whatever to support the verdict, and that the judgment rendered thereon should be reversed. *State v. Hoagland*, 185.
4. ———: **DEGREE OF PENALTY.** The provision of chapter 83, Laws of 1886, that nothing in that act contained shall shield the pharmacist who abuses his trust "from the utmost rigors of the law now or hereafter in force in relation to the sale of intoxicating liquors," does not require the court to impose the extreme penalty of one thousand dollars upon every pharmacist who unlawfully sells intoxicating liquors. *Id.*
5. **NUISANCE: BY REGISTERED PHARMACIST HOLDING PERMIT: CODE, SECTION 1540.** In section 1540 of the Code, providing that if any person not holding *such* permit * * * sell * * * any intoxicating liquors," etc., the permit referred to is that provided for in the preceding sections, viz., a permit granted by the board of supervisors for the sale of intoxicating liquors for certain enumerated purposes, and not the permit of a registered pharmacist to sell for the actual necessities of medicine only, granted under chapter 83, Laws, 1886. Hence sales by a registered pharmacist for any other purpose than the actual necessities of medicine are as certainly forbidden and made punishable by section 1540 as are sales by persons having no authority to sell for any purpose; and the keeping of a place where such sales are made is prohibited and declared a nuisance by section 1543. (*State v. Douglas*, 73 Iowa, 279, distinguished.) *State v. Salts*, 193.
6. ———: **INJUNCTION: DESIGNATION OF PROPERTY: CONTEMPT.** A writ enjoining a party from unlawfully selling intoxicating liquors on "part of lot number two, in the northeast quarter of the northwest quarter of section twenty-three," etc., is not void for uncertainty, as the mandate would be violated, and the offender made liable to punishment for contempt, by doing the forbidden acts on any part of the lot. [GRANGER and ROBINSON, JJ., *dissenting*.] *Ver Straeten v. Lewis*, 130.

7. ———: ———: CONTEMPT : EVIDENCE AS TO PLACE OF OFFENSE. In a proceeding for contempt in violating an injunction against the maintenance of a liquor nuisance on "part of lot number two," a witness who testified to the doing of the forbidden acts by the enjoined party was unable to testify from his personal knowledge that the building in which the forbidden acts were done was situated on lot number two; but he testified that he had examined a plat of the town in which the property was situated, and that he was able to say from that examination, and his knowledge of the location and surroundings, that the building was situated on that lot. *Held* that this evidence was not only not incompetent, but that it satisfactorily established the fact of the violation of the injunction. *Id.*
8. NUISANCE : INJUNCTION : EVIDENCE. Action to enjoin a liquor nuisance. The evidence establishes that defendant kept a public eating-house and restaurant; that he kept intoxicating liquors; that he paid a special tax to the United States as a liquor dealer; and that the reputation of his place was that of a place where intoxicants were kept and sold. Adding to the presumptions which arise from these facts, under the statute, the testimony tending to show actual sales (for which see opinion), *held* that the state was entitled to an injunction and a judgment for costs, including an attorney's fee. *State v. Mathieson*, 485.
9. NUISANCE : ATTORNEY'S FEES : AMOUNT OF : IN APPELLATE COURTS. Under chapter 66, Laws of 1886, the plaintiff, if successful in an action to abate a liquor nuisance, is entitled to recover such attorney's fees as may be reasonable for the service necessarily rendered, in whatever court, not less than twenty-five dollars. In this case, which was begun in the district court, removed to the federal court, appealed to the supreme court of the United States, and remanded to the district court where it was instituted, *held* that an attorney's fee of three hundred and fifty dollars was not unreasonable, and should have been allowed upon the evidence. *Farley v. O'Malley*, 531.
10. ———: ERROR IN REFUSING INJUNCTION. Where in an action to enjoin a liquor nuisance the findings of the court, sustained by the evidence, fully warranted a permanent injunction, it was reversible error not to grant it. *Id.*
11. ———: LAWS OF 1886, CHAPTER 66 : APPLICATION TO PENDING SUITS. Chapter 66, Laws of 1886, providing that in actions to abate liquor nuisances "evidence of the general reputation of the place designated in the petition shall be admissible for the purpose of proving the existence of such nuisance, and, if successful in the action, the plaintiff shall be entitled to an attorney's fee of not less than twenty-five dollars, to be taxed and collected as costs against the defendant," *held* applicable to suits pending when the law was enacted. (Compare *McLane v. Bonn*, 70 Iowa, 752; *Drake v. Jordan*, 73 Iowa, 707.) *Id.*

JUDGES.

1. SUCCESSION : CONTRARY RULINGS : WHICH CONTROLS. Where a demurrer to a petition for a writ of *certiorari* is overruled, and the defendants make a return to the writ as required by its terms, and, on the trial of the issues made by the return, questions legitimately arise which were involved in the issues presented by the demurrer, and after the determination of the demurrer there is a change in the judges of the court, it is the duty of the court as then constituted to pass upon such issues, and if in that case the court holds at variance with the ruling on the demurrer, the last ruling must be the controlling one in that court. *Richman v. Supervisors Muscatine County*, 513.

2. ALLEGED PREJUDICE OF: DUTY AS TO CHANGE OF VENUE. See Criminal Law, 4.

JUDGMENT.

1. JURISDICTION: RECITALS: APPEARANCE OF COUNSEL: EVIDENCE: PRESUMPTION. R. began an action against P. to foreclose a mortgage, and made S., who held one of the mortgage notes, a party. S., in a cross-petition, asked for judgment on his note and for a foreclosure of the mortgage; and a personal judgment was rendered in his favor against P., although P. was served with notice of the cross-petition by publication only, and the decree recited that he appeared neither in person nor by attorney. In an action to enforce the judgment against P.'s administrator, it was shown by the record that attorneys appeared for P. in the case at a term prior to that at which the judgment was entered, and one of the attorneys testified that his firm appeared in that case for P. But it appeared that these attorneys appeared also for S. in the case. *Held* that, if this evidence was admissible at all as against the recitals in the decree, it must be regarded as showing only that these attorneys appeared for P. in the original case, and not as to the cross-petition, because they could not lawfully have appeared for both S., the plaintiff in the cross-petition, and P., the defendant therein; and the court will entertain presumptions in favor of the lawful conduct of attorneys, and of the truthfulness and consistency of judicial records. Consequently, *held*, further, that the personal judgment was invalid for want of jurisdiction to render it. *Scovil v. Fisher*, 97.
2. DEFAULT: MOTION TO SET ASIDE: NEGLECT OF COUNSEL: EXCUSE. Plaintiffs filed their petition herein February 25, 1888. On the first day of the term, to-wit, March 19, the defendants appeared and filed a motion to strike portions of the petition. This motion was sustained March 23, and on the next day defendants answered, asking that the petition be dismissed, and that defendants' title be quieted, and for general relief; and one of the defendants set up a counter-claim. March 26, defendants filed a motion for default against certain of the plaintiffs, and on the same day the defendant who filed the counter-claim moved for default thereon against the other plaintiff. At that time the plaintiffs had not appeared to the motions and answers, and so far as the record shows, had done nothing in the cause after filing the petition. The motions for default were not resisted, and they were sustained the day they were filed, and final decree rendered accordingly. April 12, following, plaintiffs filed motions to set aside all these orders and the decree, and these motions were overruled. Plaintiffs resided several hundred miles from the seat of the court in which they had begun their cause. Nearly three weeks before the term commenced they wrote the clerk asking to be advised of papers filed and for copies to be sent, "if not too much trouble." This letter was not answered, and they took no further steps to advise themselves of the condition of the case, nor of the business of the court, until after the decree was rendered. *Held* that plaintiffs' neglect, through their attorneys, was not excusable, and that the motions to set aside the orders and decree were properly overruled. (See opinion for statutes and authorities bearing on the question.) *Williams v. Wescott*, 332.
3. ——— : ——— : SHOWING OF MERITS. Where the affidavits filed by plaintiffs in support of a motion to set aside a judgment against them, entered by default, do not add materially to the showing of merits made by the petition, and show no defense to a counter-claim, except by a general averment of a perfect defense thereto, made by one of the plaintiffs' attorneys, the showing is insufficient to entitle the plaintiffs to a favorable ruling on the motion. *Id.*

4. **CAPACITY OF PLAINTIFF: ESTOPPEL.** Where an executor takes judgment in his own name on an account due to the estate, and he collects the amount thereof, and for a legal reason he is required to refund the money, he is estopped from questioning the judgment for the purpose of avoiding personal liability for the money received. *Jones v. Blumenstein*, 861.
5. **TRANSCRIPT: DEFECTIVE INDEX: SUBSEQUENT MORTGAGE: CORRECTION OF INDEX: NOTICE: PRIORITY.** Defendant Hesser executed a mortgage on real estate to plaintiff. Prior to that time a judgment had been obtained against Hesser in another county, and a transcript sent to the county where the land was, and it was filed and entered in the index of all liens, but the name of the defendant in the index was so written as to look more like Hesse than Hesser; and after the mortgagee had examined the index for liens against Hesser and found none, and after the mortgage had been executed, the clerk changed the name as it appeared in the index to Hesser, by changing a curve at the end of Hesse, and which he thought was intended for an r, to a plain r. In an action to foreclose the mortgage, a purchaser of the land under the judgment was made a party, and, upon the question of priority, *held*—
 - (1) That the clerk had no authority to change the index, and that it must be regarded as showing a judgment against Hesse and not against Hesser, and that the names are so dissimilar that one looking for encumbrances against Hesser would not be charged with notice or put on inquiry. (See *Thomas v. Desney*, 57 Iowa, 58; *Howe v. Thayer*, 49 Iowa, 154.)
 - (2) That plaintiff was justified in relying on the "index of all liens," and was not required to consult other indexes for judgments against the property.
 - (3) That the judgment was not a lien as against plaintiff until it was entered in the "index of all liens," as required by Code, section 197; and, *arguendo*, that no judgment is fully rendered so as to operate as a lien until it is entered on the books prescribed by statute.
 - (4) That since plaintiff had no actual notice of the judgment, and no constructive notice by record, his mortgage was superior to the title under the judgment. *Aetna Life Ins. Co. v. Hesser*, 881.
6. **REVERSAL: RESTITUTION OF PROPERTY TAKEN UNDER.** W. was the owner of stock in the plaintiff company, which he assigned as collateral security to the defendant bank, but which was afterwards claimed by the attaching creditors of W. The stock was not transferred to the bank on the company's books. The district court held that the bank had the superior right to the stock, and ordered it to be sold by the receiver in the case. It was sold accordingly to one, Bentley, but he was the bank's cashier, and the evidence (see opinion) shows that he acted as mere agent for the bank, which was the real purchaser. Bentley paid the purchase price to the receiver, and new shares of stock were issued to the bank. Upon an appeal to this court from the judgment of the district court, it was reversed on the ground that the attaching creditors of W. had the superior lien on the stock. By this time the stock had become worthless, if, indeed, it was not so at the time of the receiver's sale. Upon further proceedings on *procedendo*, *held* that the appellants were entitled to a surrender by the bank of all the stock which it received at the sale, but not to the payment by the bank of the amount bid for such stock. *Fort Madison Lumber Co. v. Batavian Bank*, 893.

7. ———: **MISTAKE IN DECREE.** A mere mistake in the numerals used in the decree appealed from in designating the number of shares of stock to be sold, where the decree otherwise indicated the shares in question, is no ground for reversal, as the record below can be corrected at any time. *Id.*
8. **AGREEMENT TO ENTER IN VACATION.** Where the parties consented that judgment should be entered in vacation as of the last day of the preceding term, but it was entered a few days after the opening of the next term, *held* that this was not prejudicial to defendant, and was no ground for reversal. *Farley v. O'Malley*, 581.
9. **MECHANIC'S LIEN: PRIORITY: PARTIES.** In 1879, B. purchased the land in question and contracted with F. for the erection of a building thereon, which was completed about May, 1880. On the seventh of May, 1880, the defendant bank filed in that county a transcript of a judgment against B., which became a lien on the land, and at once began an action against B. and Mrs. B., plaintiff herein, to subject the land to the satisfaction of the judgment; and there was a decree that it be so subjected, and execution issued thereon, and the premises were to be sold February 24, 1883; but on that day the defendant R., who was the attorney for B. and wife in the action, took an assignment of the judgment, and the execution was returned unsatisfied. Afterwards, in 1886, R. caused execution to issue on the judgment, and himself bought the property thereunder, and obtained a deed therefor. In the meantime, August 21, 1880, F. duly filed his statement for a mechanic's lien against B. for materials and work on the building, and July 29, 1881, assigned it to Mrs. B., plaintiff herein, who, in August, 1882, began an action to foreclose it, making her husband B. and the defendant bank parties; but she afterwards dismissed the suit as to the bank, and judgment was taken against B., and the lien established. The premises were sold, July 19, 1884, to plaintiff under this judgment, and in a year thereafter she received a sheriff's deed therefor. In an action against the bank and R. to quiet her title, *held* that, since plaintiff was a party to the bank's suit to subject the land to its judgment, but the bank was dismissed as a party to her suit to establish the mechanic's lien, its title, had it obtained one by sale under its judgment, would have been superior to hers, but, having assigned its judgment, it had no interest in the property; but that the title of R., its assignee, was superior to that of plaintiff. *Baker v. First Nat. Bank of Davenport*, 615.
10. **PERSONAL JUDGMENT ON PUBLISHED NOTICE.** See Attachment, 6.
11. **NUNC PRO TUNC JUDGMENT IN REM ON PUBLISHED NOTICE.** See Attachment, 8.
12. **DECREE NOT WARRANTED BY RECORD.** See Injunction, 8.
13. **FINES IN JUSTICES' COURTS: HOW MADE LIENS ON REAL ESTATE.** See Intoxicating Liquors, 2.
14. **CONFLICTING RULINGS OF SUCCESSIVE JUDGES.** See Judges, 1.
15. **VALIDITY OF DECREE IN PARTITION.** See Partition, 1-4.
16. **DENYING JUDGMENT ON DEFAULT.** See Practice and Procedure, 2.
17. **PARTIAL DECISION OF CAUSE.** See Partnership, 2; Wills, 1.
18. **JUDGMENT LIEN: DEPOSIT AS SECURITY AGAINST: WHO ENTITLED TO.** See Real Estate, 4.
19. **DURATION OF JUDGMENT LIEN.** See Mortgages, 10 (8).
See ESTATES OF DECEDENTS, 4; SET-OFF, 1.

JUDICIAL SALES.

1. PAYMENT OR PURCHASE OF CERTIFICATES : REDEMPTION BY JUNIOR LIEN-HOLDER. E., who was plaintiff's son, was the owner of the four acres of land in controversy. The land was sold successively on several judgments against the son, one of which was also against the mother (plaintiff) as surety. The mother made an arrangement with defendant B., whereby he was to acquire the certificates of purchase and extend to her the time for redemption. L. afterwards purchased the land upon execution on a judgment inferior to those above referred to, and he claimed to hold it as against plaintiff, on the ground that plaintiff's arrangement with B. amounted to a payment and extinguishment by her of the prior liens, thus making his lien the first one. But *held* that his claim could not be sustained, for two reasons: *First*, because plaintiff, as a surety, had the right to redeem, and thus to acquire the judgment for which she was surety, and hold it for her own protection, and by doing so she did not pay and extinguish it; *second*, L.'s effort to redeem was not made within the time prescribed by the statute. *Bleckman v. Butler*, 128.
2. PARTITION SALE IS JUDICIAL SALE. See Dower, 1.
3. CAVEAT EMPTOR : ESTOPPEL. See Homesteads, 4.
4. VACATION OF : RESTITUTION OF MONEY. See Homesteads, 5; Judgments, 6.

See ATTACHMENT, 6, 7, 8.

JURISDICTION.

1. OF SUPREME COURT. See Appeal, 1-12, *passim*; Practice in Supreme Court, 1, 2.
2. OF TOWNSHIP TRUSTEES. See Animals, 1.
3. OF DISTRICT COURT. See Courts, 1-4.
4. OF JUSTICES' COURTS IN ATTACHMENT. See Justices and Their Courts, 2.

JURORS AND JURY.

1. MISCONDUCT OF : APPEAL. This court will not reverse a judgment on the ground that the jury permitted the sheriff and bailiff to communicate with them, where it is not shown that the communications were such that the jury could have been influenced thereby. *Miller v. Root*, 545.
2. SELECTION OF. See Criminal Law, 8.
3. INTOXICATION OF JUROR. See Criminal Law, 9.

See GRAND JURORS.

JUSTICES AND THEIR COURTS.

1. APPEAL : PRACTICE : EXCEPTIONS. While an objection in a justice's court need not be made as formally, and a record of it made as fully, as is required in courts of record, yet a party objecting to a decision rendered in a justice's court must, in an intelligible manner, and at the time, make his objection known, in order to have the decision reviewed by proceedings in error. (See Code, sec. 8516.) *Condray v. Stifel*, 283.

3. **JURISDICTION IN ATTACHMENT: NON-RESIDENT DEFENDANTS.** Under section 3511 of the Code, justices of the peace have jurisdiction of actions commenced by the attachment of property found within their respective townships, and to subject such property to the payment of the plaintiffs' claims, though the defendants do not reside in the state, and no personal service of notice is made upon them. The posting of notices in accordance with sections 3609, 3610 is sufficient to confer jurisdiction over the property. Sections 3507 and 3517 of the Code, relating to the jurisdiction of justices, and the commencement of actions before them, are not in conflict with section 3511, and do not annul it. *Anderson v. Union Pac. Ry. Co.*, 445.
8. **TRANSFER OF CAUSES BY CONSENT TO DISTRICT COURT.** See Courts, 1.
4. **JUDGMENTS FOR FINES: HOW MADE LIENS ON REAL ESTATE.** See Intoxicating Liquors, 1.

LAND.

See REAL ESTATE.

LANDLORD AND TENANT.

1. **ACCESS TO LEASED PREMISES.** The lessee of one portion of a double business house cannot claim a right of access thereto through the other portion,—though such access is granted by the lessor for a time as a matter of accommodation,—where there are other means of access to the leased portion, and no provision for such right is made in the written lease. If such right of access were shown to be necessary to the proper use and enjoyment of the leased portion, the case might be different. *Ward v. Robertson*, 159.
2. **TITLE TO PROPERTY ON FARM.** Where a tenant leases a farm and is to pay as rent one-half of all the products and stock raised thereon, he has a half interest in such products and stock, and it cannot be taken to satisfy the landlord's debts. *Stickney v. Stickney*, 699.
8. **LANDLORD'S LIEN: PRIORITY OVER MECHANIC'S LIEN AND CHATTEL MORTGAGE.** See Mechanic's Liens, 2-4.

LARCENY.

See CRIMINAL LAW, 16, 25.

LEVEES.

1. **COST: LIABILITY OF LANDS INDIRECTLY BENEFITED.** Lands not swampy or overflowed, but which are indirectly benefited by the construction of a public levee by the improvement of means of access by roads, and by the reclamation of low, wet lands in the vicinity, may properly be taxed to pay for the construction of the levee. *Chambliss v. Johnson*, 611.
2. **THROUGH TWO COUNTIES: ASSESSMENT TO PAY FOR: RIGHT OF APPEAL.** Where a public levee is constructed through two counties, any person aggrieved by the action of the board of supervisors in locating the levee, or in fixing the number of acres benefited by reason of the construction of it, and to be assessed to pay for it, has the right to appeal to the district court (Chap. 85, Laws of 1880), but on an appeal from an assessment actually made, the question whether the land is assessable cannot be raised, but only the question whether it has been assessed in proper proportion. Chapter 189, Laws of 1886, does not apply to levees. *Id.*

See CONSTITUTIONAL LAW, 1-4.

LIENS.

1. DEFECTIVE "INDEX OF ALL LIENS:" NOTICE. See Judgment, 5.
2. ORDER OF. See Priorities.

FOR LIENS OF VARIOUS KINDS, see appropriate titles.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

ACTION FOR DIVORCE AND ALIMONY. The filing of a petition for divorce, in which it is alleged that the defendant has real estate, and asking for judgment for alimony, and that it be made a special lien on defendant's real estate, does not create a lien on the real estate, nor give notice of an interest therein, under section 2628 of the Code; but *held* that a mortgage made by defendant on his real estate after the filing of such petition, and recorded before judgment for alimony is rendered in such case, is a lien superior to the judgment. *Scott v. Rogers*, 488.

MANDAMUS.

WHEN PROPER REMEDY. See Taxation, 1.

MASTER AND SERVANT.

1. **INJURY TO SERVANT: NEGLIGENCE OF FELLOW-SERVANT: LIABILITY.** An employer is not liable for damages sustained by an employe from the negligence of a co-employe, notwithstanding he is higher in authority than the one receiving the injury. (See opinion for authorities.) And so, in this action to recover for an injury received by an employe through defective machinery constructed and used, during the absence of the superintendent and without his direction, but under the direction, as plaintiff alleges, of another employe, *held* that there was no evidence that the other employe, if he did direct the construction and use of the defective machinery, had any authority so to do, and that instructions based upon the theory that he had such authority were unwarranted and erroneous. *Wilson v. Dunreath Red-Stone Quarry Co.*, 429.
2. ———: **EVIDENCE: DECLARATIONS OF FELLOW-SERVANT: RES GESTÆ.** In an action by a servant for any injury caused by the negligence of a fellow-servant, alleged to have been a temporary vice-principal, the declarations of the fellow-servant made before and after the accident causing the injury, and no part of the *res gestæ*, are not admissible to bind the master. *Id.*
3. ———: **CONTRIBUTORY NEGLIGENCE: EVIDENCE.** In an action for an injury received by an employe while riding down a tramway on a car, evidence tending to show that plaintiff was warned of the danger of getting on the car, and that he knew it was a perilous ride, should have been admitted as bearing on the question of his own negligence. *Id.*
4. **INJURIES TO EMPLOYEES.** See Railroads, 21-28.

MECHANIC'S LIENS.

1. **FORECLOSURE: PRIOR LIEN: SALE: REDEMPTION: POSSESSION.** Where materials are furnished for an independent building on mortgaged premises, the material man has the prior lien on the building, and the mortgagee on the land; and upon the foreclosure of the mechanic's lien the court may, as between the material man and the owner, direct the sale of the building as personal property, *i. e.*, without redemption, giving the mortgagee a reasonable time in which to redeem the building before its removal, and in the meantime awarding the possession of the building to the purchaser, when such possession will not materially interfere with the owner's possession of that portion of the land not occupied by the building. (See sec. 9, chap. 100, Laws of 1876.) *Luce v. Curtis*, 847.
2. **COLLATERAL SECURITY TO DEFEAT.** In an action by a material man against a landlord and tenant to establish and enforce a mechanic's lien upon improvements placed on the premises by the tenant, the fact that plaintiff sought to establish that the landlord was a purchaser of the materials, and to make him personally liable, did not defeat the right to a lien, under section 2129 of the Code, providing that one cannot have a lien who has collateral security on the contract,—where the claim of personal liability was before trial dismissed without prejudice. *National Lumber Co. v. Bowman*, 706.
3. **ERROR IN DESCRIBING PREMISES: ACTUAL NOTICE.** In such action, an error in describing the premises, in the claim filed for the lien, did not defeat the right to the lien as against the landlord, where he had actual notice of all the facts, and could not have been misled by the error, but must have known that the lien was claimed on these very improvements. *Id.*
4. **LANDLORD'S AND MECHANIC'S LIENS: CHATTEL MORTGAGE: PRIORITY.** A mechanic's lien for materials, on improvements made by a tenant on leased land in accordance with the terms of the lease, and with knowledge of the landlord, is superior to the landlord's lien for rent, and also to a chattel mortgage on the improvements taken by the landlord after they were made, but prior to the proceedings to establish the lien. (See opinion for statutes and cases cited.) *Id.*
5. **MATERIALS TO CONTRACTOR: CONTRACTOR PAID BY OWNER IN ADVANCE.** Where a contractor receives payment in full before the agreement with a sub-contractor for materials is made, the sub-contractor cannot have a lien as against the owner or his property. See *Stewart v. Wright*, 52 Iowa, 877; *Roland v. Railway Co.*, 61 Iowa, 880.) In this case it was claimed that the contractor was in fact the company for which the work was done, and that, therefore, the company and its property should be charged with the lien; but the evidence (see opinion) does not support the claim. *Mallory v. City of Marion Waterworks Co.*, 715.
6. **PRIORITY.** See Judgment, 9.

MERGER.

See MORTGAGES, 1, 2.

MINORS.

See GUARDIANS, 1; PARTITION, 2.

MINORITY.

PRESUMPTION AGAINST. See Parties to Actions, 1.

MISTAKE.

See DEEDS, 1, 2; GUARANTY, 2; JUDGMENT, 7; TAXES, 1.

MITTIMUS.

LIFE OF. See Criminal Law, 21.

MORTGAGES.

1. **PURCHASE OF LEGAL TITLE BY MORTGAGEE: MERGER.** A father held a first mortgage on his son's land. Afterwards he purchased the land for a given sum, paying in cash the difference between that sum and the amount of the mortgage. The father did not at this time know of any junior liens on the land, but he did not give up the note and mortgage, and the latter was not cancelled of record. *Held* that there was no merger of the mortgage in the legal title, but that it remained the first lien in his hands and those of his assignee. . (See cases cited in opinion.) *Gray v. Nelson*, 63.
2. ———: **ACCOUNTING TO JUNIOR LIEN-HOLDERS FOR RENTS AND PROFITS.** Where a mortgagee buys the legal title to the mortgaged land, although his mortgage is not merged therein in favor of junior lien-holders, he is not required, in the adjustment of liens, to account to them for the rents and profits of the land for the time he has enjoyed it under his deed. *Id.*
3. **ASSUMPTION BY PURCHASER OF LAND: AGREEMENT WITHOUT MUTUALITY: FRAUD: EVIDENCE.** Defendants, husband and wife, were owing four certain mortgages on their land, which plaintiffs either owned or had authority to collect; also another mortgage to M., which was of record, but of which plaintiffs had no actual notice. Defendants proposed to convey the land to plaintiffs in satisfaction of the encumbrances, and plaintiffs accepted the proposition, and a plain warranty deed without reservations was made accordingly, but the evidence (see opinion) shows that plaintiffs understood that the four mortgages held by them were the only encumbrances, and that they did not intend to assume any other, and that defendants knew of the mortgage to M. *Held*—
 - (1) That if defendants understood that plaintiffs meant to assume the mortgage to M. also, then the minds of the parties did not meet, and there was no agreement in law.
 - (2) That if defendants knew that plaintiffs were relying on their statements as to liens, then it was a fraud for them not to disclose the existence of the mortgage to M., and such a fraud as to make the agreement void, if one was made. *Head v. Thompson*, 263.
4. **FORECLOSURE: ILLEGAL CONSIDERATION: BURDEN OF PROOF: EVIDENCE.** In an action to foreclose a mortgage against the grantee of the mortgagor, who has assumed the payment of the mortgage, and who sets up as a defense that the notes were given for intoxicating liquors sold contrary to law, and that therefore no recovery can be had thereon, the defendant has the burden of proof to establish such defense, but he fails so to do in this case. *Ressegieu v. Van Wagenen*, 351.

5. **NEW NOTES GIVEN FOR SECURED DEBT.** A real-estate mortgage continues to be a valid lien, though the original notes secured thereby are defaced and new ones executed in their stead. *Reid v. Abernethy*, 488.
6. **DELIVERY: WHAT AMOUNTS TO.** A mortgage may be deemed delivered and accepted when it is executed and filed for record by the mortgagors pursuant to an agreement with the mortgagee that it should be so executed and filed. (See opinion for citations.) *Id.*
7. **TO CREDITOR'S WIFE: CONSIDERATION.** A mortgage and notes made to a wife for a debt owing to the husband cannot, on that account, be set aside as fraudulent and without consideration by subsequent creditors of the mortgagors. *Id.*
8. **FORECLOSURE: PARTIES.** One who holds a certificate of purchase of land upon the foreclosure of a junior mortgage is, during the year allowed by law for redemption, only a lien-holder, and is not a necessary party, though a proper one, to the foreclosure of a senior mortgage; and, if no redemption is made, and a sheriff's deed is executed to him, it does not divest the lien of the senior mortgage, though such lien can be enforced against him only after his rights have been adjudicated in the manner provided by law. *Stanbrough v. Daniels*, 561.
9. ——— : **REDEMPTION BY PURCHASER UNDER JUNIOR FORECLOSURE: TERMS OF: EQUITY.** Where two mortgages made and filed at the same time on the same land, and which were therefore co-ordinate liens (*Koevenig v. Schmitz*, 71 Iowa, 186), were foreclosed, and the sheriff held a special execution on each, but sold on one only, and plaintiff bid the whole amount due on both, including costs, and the sheriff applied the surplus, after paying the execution on which he sold, to the satisfaction of the other execution, *held* that, though this may have been irregular, it accomplished just what equity would have decreed, and therefore a court of equity rightly refused to disturb it on the complaint of a purchaser, under a junior foreclosure, that the surplus should have been paid to her; also, that the court, in an action to fix the terms and limit the time of redemption by her (she not having been made a party to the foreclosures), properly ordered that, to effect such redemption, she should pay the whole amount bid by plaintiff, with ten per cent. thereon from date of payment, not excepting the costs made in the foreclosure of the senior mortgages. *Id.*
10. **RIGHT OF REDEMPTION FROM FORECLOSURE SALE: JUNIOR LIEN-HOLDER NOT MADE PARTY: STATUTE OF LIMITATIONS.** Plaintiff claims title under a sheriff's deed upon the foreclosure of a mortgage which fell due January 1, 1877. On the same day defendants obtained a judgment lien on the land, but they were not made parties to the foreclosure. The deed under the foreclosure was dated September 19, 1879. In 1886, defendants caused execution to issue on their judgment, and the land to be sold thereunder, and they purchased it, taking a certificate of sale on the eighth of February, 1887. In this action by plaintiff to quiet his title, *held*—
 - (1) That defendants' only right was to redeem from plaintiff, and that it was necessary to exercise that right within the ten years following January 1, 1877, after which their judgment ceased to be a lien on the land, under section 2882 of the Code. (See *Gower v. Winchester*, 83 Iowa, 808, and *Crawford v. Taylor*, 42 Iowa, 260.)

(2) That their time for redemption was not extended, or their rights in any way enlarged, by the fact that the execution issued upon their judgment, and under which they purchased, was issued prior to January 1, 1887, the time when their lien expired, and their purchase of the land thereunder after that time.

(8) That the said limitation of ten years was not prevented from running against defendants by the fact that during a portion of the time the persons who held the title under the foreclosure lived in another state; the provision of the general statute of limitations, that it shall not run during the non-residence of the debtor, having no application to the duration of a judgment lien. (See *Hendershott v. Ping*, 24 Iowa, 184.) *Albee v. Curtis*, 644.

11. SECURING SEVERAL NOTES: ASSIGNMENT OF PART: SEPARATE FORECLOSURES. Conceding the rule that the proceeds of mortgaged property sold under special execution to satisfy a mortgage debt made up of different notes should be applied to the payment of such notes in the order of their maturity, and that one sale of the mortgaged premises exhausts the lien of the mortgage; it does not apply to cases modified by special circumstances. And it is *held* in this case that the mortgagee may, without the consent of the mortgagor, assign the notes last falling due, and, by agreement with the assignee, make the assigned notes the first lien. And where that is done, and the agreement is in writing duly acknowledged and recorded, and the mortgagor afterwards sells the land, and the mortgagee forecloses the mortgage as to the notes retained by him, and buys in the land for only enough to satisfy the judgment, and the grantee of the mortgagor redeems, he cannot, under a claim that the mortgage lien was exhausted upon such sale, prevent the assignee of the notes constituting the first lien under the agreement from foreclosing the mortgage as to such notes. *Morgan v. Kline*, 681.

12. PRIORITY. See Judgment, 5, 9; Mechanics' Liens, 1.

See CHATTEL MORTGAGES.

MURDER

CONVICTION ON CIRCUMSTANTIAL EVIDENCE. See Criminal Law, 15.

MUSCATINE ISLAND LEVEE.

See CONSTITUTIONAL LAW, 1-4.

NAMES.

DISCREPANCY OF IN JUDGMENT RECORDS. See Judgments, 5.

NEGLIGENCE.

1. IN CASE OF WALKS. See Cities and Towns, 2.
2. IN PROVIDING PROPER MACHINERY. See Master and Servant, 1-3.
3. IN OPERATING RAILROADS. See Railroads, 9-82.
4. OF ATTORNEYS IMPUTED TO CLIENT. See Attorneys at Law, 4.

See CONTRIBUTORY NEGLIGENCE.

NEW TRIALS.

1. **DISCRETION OF TRIAL COURT.** An order granting a new trial will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion in granting it. *Peebles v. Peebles*, 11.
2. **MISCONDUCT OF COUNSEL: DISCRETION OF COURT.** If it was misconduct on the part of the plaintiff's attorney, in his closing remarks to the jury, and in the absence of the judge, to comment upon a case which had been read to the court in the hearing of the jury, the granting of a new trial on that ground was a matter for the sound discretion of the trial court, whose action cannot be set aside without a showing of the abuse of that discretion. (See *George v. Swafford*, 75 Iowa, 491.) *Shepard v. Chicago, R. I. & P. Ry. Co.*, 54.
3. **SURPRISE: EVIDENCE NOT PREJUDICIAL.** A new trial is properly refused on the ground of surprise in certain testimony, where it appears that such testimony was not prejudicial to appellant. *Key v. Des Moines Ins. Co.*, 174.
4. **VERDICT JUSTIFIED.** Where the verdict was justified by the evidence and instructions, a motion for a new trial, on the ground that the verdict was contrary to the law and the evidence, was properly overruled. *Richmond v. Sundburg*, 255.
5. **EVIDENCE NOT IN CASE CONSIDERED BY JURY.** Where evidence not in the case is improperly taken to the jury room and considered as evidence by the jury, that fact, without further inquiry as to its effect, is ground for a new trial. (See opinion for application of rule.) *Kruidenier v. Shields*, 504.
6. **INSTRUCTIONS: EXCEPTIONS.** A new trial is properly refused on the ground of error in an instruction not excepted to when given, and as to which no ground of objection is stated in a motion for a new trial, though it is therein alleged to be erroneous. *Lyons v. Van Gorder*, 600.
7. **APPLICATION FOR NEW TRIAL: FINDING OF COURT: APPEAL.** An application for a new trial under section 8155 of Code, based on grounds discovered after the term at which the verdict is rendered, is triable by ordinary proceedings, and where the evidence on which the ruling is made is conflicting, this court cannot interfere on the ground of insufficient evidence to sustain the order. *Kruidenier v. Shields*, 504.
8. **INTOXICATION OF JUROR.** See Criminal Law, 9.
9. **NEWLY DISCOVERED EVIDENCE.** See Criminal Law, 17.
10. **MISCONDUCT OF COUNSEL.** See Criminal Law, 27.
11. **MOTION FOR: TIME OF FILING.** See Practice in Supreme Court, 82.

NOTICE.

1. **OF TRESPASSING ANIMALS.** See Animals, 1.
2. **OF APPEAL.** See Appeal, 7, 8.
3. **OF CHATTEL MORTGAGES.** See Chattel Mortgages, 2-4.
4. **OF TAKING DEPOSITIONS.** See Depositions, 1.
5. **OF APPEAL FROM ORDER ESTABLISHING HIGHWAY.** See Highways, 2.

6. OF JUDGMENT LIEN : DEFECTIVE INDEX. See Judgment, 5.
7. OF MECHANICS' LIEN. See Mechanics' Lien, 3, 4.
8. OF THE SALE OF CHATTELS : POSSESSION. See Sales, 2.
9. OF INTEREST IN LAND : POSSESSION. See Schools and School Districts, 3.
10. OF PRIOR CONVEYANCE. See Vendor and Vendee, 10.
11. TO QUIT LEASED PREMISES. See Forcible Entry and Detainer, 2, 3.
12. TO REDEEM FROM TAX SALE. See Tax Sale and Deed, 8-10.

NUISANCE.

1. TO HOMESTEAD : MEASURE OF DAMAGES. The owner of a homestead, in an action to recover for a nuisance affecting his homestead and the health and comfort of his family, is not limited to the damages sustained by reason of the depreciation of the rental value of the property, but is entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and family. (See cases cited in opinion.) *Randolf v. Town of Bloomfield*, 50.
2. SEWER : DAMAGES : EVIDENCE AS TO OTHER SEWERS. In an action for damages caused by a sewer which emptied near plaintiff's premises, evidence that another sewer of similar construction and use did not, at its outlet, produce offensive smells was properly excluded. *Id.*
3. DAMAGES : NUISANCE KEPT BY PLAINTIFF : CONTRIBUTORY NEGLIGENCE. In an action to recover for damages caused by a nuisance, the fact that plaintiff himself was guilty of keeping a nuisance resulting in similar damages to himself cannot defeat his recovery. The doctrine of contributory negligence does not apply to such a case. *Id.*
4. LIQUOR NUISANCES. See Intoxicating Liquors.

OFFICERS.

1. DE FACTO : ACTS OF. See Attachment, 11.
2. PRESUMPTION IN FAVOR OF. See Agricultural College, 1; Tax Sale and Deed, 4; Cities and Towns, 5.
3. LIABILITY FOR RELEASING ATTACHMENT. See Attachment, 2-4.
4. AUTHORITY OF. See Corporations, 3, 4.
5. TESTING RIGHT TO OFFICE. See Injunction, 4; Schools and School Districts, 6.
6. UNLAWFUL EXPENDITURE OF MONEY BY : INJUNCTION BY TAX-PAYERS. See Counties, 2.
7. DEPUTY COUNTY OFFICERS : APPOINTMENT AND COMPENSATION OF. See Counties, 1.

ORIGINAL NOTICE.

1. **SUFFICIENCY: AMOUNT CLAIMED.** The original notice in this case, following the language of the note sued on, notified defendant that plaintiffs' petition would be on file claiming of him "one hundred and seventy-nine and thirty one-hundredths, with ten per cent. interest" from the date of the note,—the word "dollars" being evidently intended, but omitted. *Held* that it was not a case of no notice, but of irregular notice only, and that a judgment for so many dollars was not void. (Compare *Woodbury v. McGuire*, 42 Iowa, 339, and *Bunce v. Bunce*, 59 Iowa, 533.) *Gray v. Wolf*, 630.
2. ———: **SIGNATURE OF OFFICER.** The return of the original notice in this case showed personal service and was signed thus: "By J. R. MYERS, Deputy. J. W. WORKMAN, Sheriff." *Held* to be good, as showing service by Myers, as deputy of Workman, sheriff. *Id.*
3. **SERVICE BY PUBLICATION: PERSONAL JUDGMENT.** See Attachment, 6-8.
4. **IN ATTACHMENT IN JUSTICES' COURTS.** See Justices and Their Courts, 2.
5. **SERVICE BY PUBLICATION ON NON-RESIDENT MINORS.** See Partition, 2.
6. **DEFECTS IN: HOW CORRECTED.** See Appeal, 9.

PARDONS.

See CRIMINAL LAW, 22, 23.

PARENT AND CHILD.

See DOMESTIC RELATIONS, 1.

PARTIES TO ACTIONS.

1. **MINORITY: PRESUMPTION AGAINST.** In the absence of any averments in the pleadings, and of any competent proofs in the record, that one of the defendants is a minor, this court must presume that she is of age, and competent to make her own defense. *Kavalier v. Machula*, 121.
 2. **TRUSTEE WITH LEGAL TITLE: QUIETING TITLE.** Under section 2544 of the Code, the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name. (See cases cited in opinion.) And the fact that the plaintiff in this action to quiet title paid nothing for the conveyance to her, and that her counsel paid the consideration, and had the conveyance made to her, even without her knowledge at the time, is no defense to the action. *Cassidy v. Woodward*, 854.
 3. **TO SUIT ON OFFICIAL BOND.** See County Treasurer, 2.
 4. **ESTOPPEL TO DENY CAPACITY.** See Judgment, 4.
 5. **ON APPEALS TO SUPREME COURT.** See Appeal, 8.
- See ATTACHMENT, 8 (8); MORTGAGES, 8; PARTITION, 1-4; SCHOOLS AND SCHOOL DISTRICTS, 6.

PARTITION.

1. **DEFECT OF PARTIES : VALIDITY AS TO THOSE IN COURT.** Although in a partition case the court does not acquire jurisdiction of all the persons interested in the real estate, the proceedings are not void or voidable as to those who are actually or constructively in court. *Williams v. Wescott*, 332.
2. **SERVICE BY PUBLICATION : NON-RESIDENT MINORS.** Service by publication in partition cases is expressly authorized by section 2718 of the Code, and where non-resident minors are so served, and a guardian *ad litem* is appointed and answers for them, the judgment is final and conclusive as to them. *Id.*
3. **ACQUIESCENCE OF PARTIES AND ACCEPTANCE OF SHARES : ESTOPPEL.** Where parties to a partition suit acquiesce in the proceedings and receive and retain their shares of the proceeds, they are estopped to question the validity of the proceedings, and so is one who takes from them a subsequent conveyance of their interest in the land, with knowledge of the facts. *Id.*
4. **RIGHT OF ONE CO-PLAINTIFF TO ASSIGN AND DISMISS : INTERVENTION OF ASSIGNEE : RES ADJUDICATA.** One of the plaintiffs in this action for partition was the devisee of a life-estate in the land, but in the petition she claimed only a fractional share. After the petition had been filed, but before any pleading or claim of any kind had been filed presenting an issue against her, she assigned to H. her life-estate, and filed in the court a statement of that fact and a dismissal of the action as to her on that ground ; but the court entered judgment confirming the shares as set out in the petition, and appointed referees to partition the land. Afterwards, on the intervention of H., asking for a dismissal of the cause, and upon the motion of himself, his assignor and all of the defendants, praying for a dismissal, the court modified the judgment so as to substitute H. in the place of his assignor in the partition. Afterwards H. filed a supplemental petition of intervention, setting up his life-estate, and asking that it be established against the premises. On this issue the court found that he had received all the equity to which he was entitled in the judgment for partition, as modified.
Held—
 - (1) That, under section 2544 of the Code, H.'s assignor had a right to dismiss the action as to herself, and that thereafter she was not a party thereto, and that the judgment of partition did not bind her. If other parties desired to proceed with the cause as against her, they should have made her a party defendant. (Code, secs. 2547, 2551.)
 - (2) That the judgment of partition did not bind H. as assignee, because neither he nor his assignor was a party at the time it was rendered,—his intervention not having occurred till after that time.
 - (3) That the court erred in holding, in effect, that the issue as to H.'s life-estate was adjudicated in the judgment in partition, since neither he nor that issue was then before the court.
 - (4) That the cause should be remanded to retry the cause on the application for partition, regardless of the prior adjudications, giving full opportunity to amend the pleadings and make new parties. *Ocheltree v. Hill*, 731.

See DOWER, 1.

PARTNERSHIP.

1. **EVIDENCE TO PROVE.** The note sued on was made by "Tasker Brothers." There were five brothers of that name engaged at the same place in a somewhat similar business, and they were all made defendants on the ground that they all belonged to the firm of "Tasker Brothers," and the jury found that that claim was true by bringing in a verdict against all of them. *Held* that the evidence, not set out in the opinion, was sufficient to support the verdict on appeal. *Eye v. Tasker*, 48.
2. **ACCOUNTING : DECREE : IMPROPER DIVISION OF CASE.** Action in chancery, brought against an administratrix, to settle a partnership between plaintiff and decedent, the business of which plaintiff continued to carry on after the death of his partner. Plaintiff alleges a written contract for a settlement between himself and decedent, and various mistakes, errors and omissions in the entries in the firm books, and asks affirmative relief. Defendant denies the alleged mistakes, errors and omissions in the books, and alleges other errors and omissions, which, if corrected, would show a large balance in her favor, and she asks that the accounts be settled, and for affirmative relief. The court dismissed plaintiff's petition so far as he demanded affirmative relief, but ordered that the case be retained for the purpose of requiring plaintiff to account for his trust as surviving partner, and made no disposition of defendant's claim for relief on the ground of errors in the books prior to decedent's death. *Held* that it was error thus to split the case, and pass upon plaintiff's evidence, and leave the issues growing out of defendant's claims undetermined,—especially since the determination of such issues was necessary for a proper accounting by plaintiff as surviving partner,—and that the whole case ought to have been determined together ; and it is remanded for a new trial accordingly. *Smith v. Knight*, 540.

See CHATTEL MORTGAGES, 1.

PAYMENT.

1. **WHAT IS AND IS NOT.** See Agency, 1 ; Insurance, 12 ; Judicial Sales, 1.
2. **APPLICATION OF DEPOSIT TO PAY NOTE.** See Banks and Banking, 1.

PERSONAL INJURIES.

See CITIES AND TOWNS, 2 ; MASTER AND SERVANT, 1-3 ; RAILROADS, 21-32.

PHARMACISTS.

SALES OF LIQUORS BY : PERMIT : PENALTY. See Intoxicating Liquors, 3-5.

PLEADING.

1. **WAIVER OF ERROR BY ANSWERING.** Error, if any there was, in overruling defendant's motion to require plaintiff to make his petition more specific, was waived by answering the petition. (See cases cited in opinion.) *Randolf v. Town of Bloomfield*, 50.
2. **DENYING SIGNATURE TO PAPER SUED ON : BURDEN OF PROOF.** In an action upon a contract which plaintiffs claimed to own by virtue of a written but lost assignment from the original owner, defendant denied generally the allegations of the petition. *Held* that

- this, without a special denial of the signature to the alleged assignment, put in issue the execution of the assignment and plaintiffs' ownership of the claim, and cast upon plaintiffs the burden to establish the existence of the assignment, and to show, at least, its substance, and that it was of force when the action was commenced, and when a judgment was demanded thereon. (See Code, sec. 2780.) *Probert v. Anderson*, 60.
8. TWO CAUSES IN ONE COUNT : NO OBJECTION : PRACTICE. Where two causes of action are pleaded in one count, but defendant makes no objection, the court may properly submit them both to the jury. *Joy v. Bitzer*, 73.
 4. CLAIMS AGAINST ESTATES : DENIAL PRESUMED. In an action upon a judgment as a claim against an estate, no answer is necessary, but the administrator, by resisting the claim, not only puts in issue the validity of the judgment, but of the debt on which it is founded, so that no recitals of the judgment are to be regarded as *prima-facie* evidence against him because not denied. *Scovil v. Fisher*, 97.
 5. COUNTER-CLAIM : WHAT IS NOT. It is the opinion of this court that the affirmative matter pleaded in the answer in this case (see opinion) was designed to show a defense to plaintiff's claims rather than to lay the foundation for affirmative relief, and that the case was tried in the district court on that theory, and that a decree in favor of the defendants on the allegations of the petition would have given them all the relief they could have obtained on the averments of their answer. It is therefore *held* that they were not entitled to affirmative relief on their answer, on the ground that it amounted to a counter-claim, and that no reply was filed thereto. *Kavalier v. Machula*, 121.
 6. FACTS SHOWN BY EXHIBITS. A petition must be understood as averring the facts disclosed and alleged in the exhibits attached thereto. *Marriage v. Woodruff*, 291.
 7. AVERMENTS OF ANSWER NOT DENIED : EFFECT. A reply does not necessarily admit the averments of the answer which it does not deny, nor waive the denial made by implication of law. (Compare *Day v. Insurance Co.*, 75 Iowa, 694.) *Stanbrough v. Daniels*, 561.
 8. AMENDMENT TO CONFORM TO PROOFS. An amendment of the petition to make it conform to the evidence is properly allowed at the close of the testimony. *Andrews v. Mason City & Ft. D. Ry. Co.*, 669.
 9. POINTS WAIVED BY SUBSTITUTED PETITION. Where an answer was filed, and therewith a motion to dissolve an injunction, and a demurrer to the answer was overruled and the injunction dissolved, and plaintiff then filed an amended and substituted petition, which was held bad on demurrer, and plaintiff appealed, *held* that this court, on such appeal, could not consider whether the court erred in overruling the demurrer to the answer and in overruling the injunction,—these points having been waived by the filing of the substituted petition. *State v. Simpkins*, 676.
 10. EFFECT OF SUBSTITUTED PETITION. Where a substituted petition is filed, the original petition is so far out of the case that it cannot be considered upon a demurrer to the substituted petition. *Id.*

11. **CONSIDERATION FOR DRAFTS : BURDEN OF PROOF.** The drafts sued on import a consideration. (Code, sec. 2118.) It was not, therefore, necessary for plaintiff to plead or prove it in the first instance ; and where the answer set up want of consideration, these averments were denied by operation of law, without a reply, and it was competent for plaintiff, under the issues thus raised, to show that the drafts were accepted in compromise of a dispute. *Gafford v. American Mortgage & Investment Co.*, 786.
12. **FRAUD : CONSPIRACY.** See Instructions, 19.
13. **LEGAL PRESUMPTIONS NEED NOT BE AVERRED.** See Railroads, 8, 18.
14. **AMENDMENT AFTER VERDICT.** See Verdict, 1.

See INSURANCE, 8 ; SALES, 8.

POSSESSION.

1. **AS NOTICE OF SALE OF CHATTELS.** See Sales, 2.
2. **OF SCHOOL-HOUSE SITE ; NOTICE TO SUBSEQUENT PURCHASER.** See Schools and School Districts, 8.
3. **OF STOLEN PROPERTY : PRESUMPTION.** See Criminal Law, 16.

PRACTICE AND PROCEDURE.

1. **REMARK OF COURT : EFFECT ON JURY.** A remark of the court made in announcing its opinion upon a point argued by counsel, which could not have been understood as addressed to the jury, or for their consideration, and which they could not have considered without disregarding the charge of the court, cannot be regarded as having affected the verdict. *Cormac v. Western White Bronze Co.*, 82.
2. **QUIETING TITLE : DENYING JUDGMENT UPON DEFAULT : NO PREJUDICE.** In an action to quiet title brought against W. and his grantees, although the grantees were in default, the court dismissed the petition as to all. *Held* not prejudicial error, since the judgment as to W. could not be reversed, and therefore judgment against his grantees in default could have availed plaintiff nothing. *Giltrap v. Watters*, 149.
3. **WRONG FORUM : RESULT.** The fact that an action at law is erroneously brought as an action in equity is no ground for demurrer or abatement, but only for a motion to transfer to the law docket and for a corresponding change of the proceedings. (See cases cited in opinion.) *Riddle v. Beattie*, 168.
4. **OPENING AND CLOSING.** The question as to who has the burden of proof, and the right to open and close, is a matter of practice, and the ruling of the trial court thereon will not be reviewed unless there is proof of an abuse of discretion. (See *Viele v. Insurance Co.*, 26 Iowa, 9.) *White v. Adams*, 295.
5. **PROCEDURE : JURY TRIAL : REMARK OF COURT AS TO EFFECT OF EVIDENCE.** In sustaining an objection to an inquiry into matters contained in a stipulation in another case, and introduced in evidence in this, the court said in the presence of, but not to, the jury: "I shall hold that by that stipulation defendants acknowledged that there was twelve hundred dollars and interest due the said railroad company [plaintiff herein] that has not been paid." The charge of the court fairly submitted to the jury the question of

indebtedness, and there was no real conflict in the evidence as to the fact that the amount named was due the plaintiff. *Held*—against the objection that the remark was in substance an instruction as to the effect of the evidence, and unduly affected the verdict—that under the circumstances it could have worked no prejudice to defendants. (Compare *Hall v. Carter*, 74 Iowa, 868.) *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 535.

6. **ARGUMENT TO JURY: READING MOTION FOR CONTINUANCE.** An affidavit for a continuance, when duly filed, is a part of the record in the case in which it is so filed, and it may be read to the jury and commented upon by counsel in argument (*Hanners v. McClelland*, 74 Iowa, 328; *Cross v. Garrett*, 35 Iowa, 486); and it may be so read and commented upon, although filed in another but cognate case in the same court, when the understanding is that it shall be treated as applying to both cases, and it is so treated. *Brannum v. O'Connor*, 632.
7. **EXCEPTIONS TO INSTRUCTIONS: TIME.** In order to secure a review of instructions on appeal they must be excepted to either at the time when given, or within three days after the verdict. The time for excepting is not extended by an agreement and order allowing time for filing a motion for a new trial. (See cases cited in opinion.) *Bush v. Nichols*, 171.
8. **KIND OF PROCEEDINGS.** See New Trials, 7.
9. **PROCEDURE IN PARTITION.** See Partition, 4.
10. **IMPROPER DIVISION OF CAUSE.** See Partnership, 2.
11. **DUTY OF COURT IN CONSTRUCTION OF WILL.** See Wills, 1.
12. **WHEN CERTIFICATE FOR APPEAL MUST BE SIGNED.** See Appeals, 6.
13. **NOTICE OF APPEAL: REQUISITES OF: ON WHOM SERVED.** See Appeal, 7, 8.
14. **AFFIDAVIT FOR ATTORNEY FEES.** See Attorney Fees, 2.
15. **BILLS OF EXCEPTIONS: REQUISITES OF: TIME OF FILING.** See Bills of Exceptions, 1, 2.
16. **IN JUSTICES' COURTS.** See Justices and Their Courts.
17. **SPECIAL INTERROGATORIES.** See Instructions, 10-14.
18. **FOR PRACTICE IN CRIMINAL CASES.** See Criminal Law, *passim*.

See EVIDENCE, *passim*; PLEADING, *passim*; PRACTICE AND PROCEDURE IN SUPREME COURT.

PRACTICE AND PROCEDURE IN SUPREME COURT

1. **JURISDICTION: DEFECTIVE ABSTRACT.** This court has no jurisdiction of a cause brought up from the district court where the abstract fails to show that an appeal was taken to this court. *Whitton v. Fuller*, 599.
2. **ABSTRACT MUST SHOW WHEN APPEAL TAKEN.** This court has no jurisdiction to entertain an appeal unless it affirmatively appears from the abstract that the appeal was perfected within six months after the rendition of the judgment appealed from. Jurisdictional facts cannot be presumed. *Gleason v. Collett*, 448.

3. **ABSTRACT NOT DENIED DEEMED TRUE.** An amendment to appellant's abstract, filed by appellee, will be taken as true if not denied. *Cox v. Mason City & Ft. D. Ry. Co.*, 20.
4. **AMENDED ABSTRACT NOT DENIED TAKEN AS TRUE.** The appeal in this case was based upon alleged errors in instructions. Appellant's abstract nowhere showed that the instructions were filed, and an additional abstract by appellee stated in terms that the pretended instructions set out in the abstract were never written out, signed by the judge and filed in the case. To this there was no denial. *Held* that the additional abstract must be taken as true, and the alleged instructions stricken out of appellant's abstract, on motion to that effect. *Zimmerman v. Merchants & Bankers' Ins. Co.*, 350.
5. **DENIAL OF APPELLEE'S ADDITIONAL ABSTRACT: WHAT AMOUNTS TO.** Appellee filed an additional abstract denying many statements in appellant's abstract, and then claimed that his additional abstract must be taken as true, because not denied by appellant. But appellant filed a separate paper called a "statement," in which he stated that because his abstract was denied so persistently and repeatedly by appellee, he had caused a transcript to be filed, and demanded that the costs of the transcript be taxed to appellee, and attached an index to the transcript, "by the aid of which," he stated, "all the material facts and points for the verification of the abstract can be readily found in the transcript." *Held* that this was by implication a re-affirmance of the correctness of his abstract, and required the court to resort to the transcript to determine the questions raised as to the contents of the record. *Joy v. Bitzer*, 78.
6. **ABSTRACT DENIED AS TO IMMATERIAL POINT: QUIETING TITLE: EVIDENCE.** On an appeal from a judgment quieting title in defendant, plaintiff states in her abstract that the deeds from R., under whom both parties claim, through the intermediate grantors down to her, were introduced in evidence, and defendant in an additional abstract denies this statement, and asks that the appeal be dismissed on the ground that plaintiff has not shown any ground for her claim of title. But it appears that there was an abstract of title exhibited with the petition, which showed a line of conveyances from the government, through R., down to plaintiff, and that it was conceded all through the trial that conveyances were made as set out in the abstract. In this state of the case, *held* that it was not necessary for plaintiff to introduce her deeds in evidence, and the motion to dismiss is overruled. *Cassidy v. Woodward*, 354.
7. **DENIAL OF ABSTRACT SERVED TOO LATE: CONSEQUENCES.** It is not the practice of this court to disregard an additional abstract because filed after the time fixed by section 19 of the rules of practice, though a case might arise in which such action would be justified. (Compare *Fowler v. Town of Strawberry Hill*, 74 Iowa, 645.) In this case, *held* that a denial of appellant's abstract, though served after the designated time, should be considered, since the final submission of the case does not seem to have been retarded by the delay. *Thomas v. McDanel*, 126.
8. **TRIAL DE NOVO: TRANSLATION OF EVIDENCE FILED TOO LATE.** The translation of the short-hand reporter's notes of the evidence in this case not having been filed in the office of the clerk of the trial court within the time allowed for taking an appeal, such evidence cannot be considered here, and a trial *de novo* cannot, therefore, be had. *Id.*

9. TRIAL DE NOVO : TRANSLATION OF EVIDENCE FILED TOO LATE. Section 2742 of the Code requires the translation of the short-hand reporter's notes of evidence in an equity case not only to be certified by the trial judge, but also to be filed in the office of the clerk of the trial court, within the time allowed for taking an appeal, in order to entitle appellant to a trial *de novo* in this court. (*Arts v. Culbertson*, 78 Iowa, 14, *followed*. and *Runge v. Hahn*, 75 Iowa, 738, *distinguished*.) *Kavalier v. Machula*, 121. .
10. TRIAL DE NOVO : WHAT EVIDENCE TO BE CERTIFIED. In order to a trial *de novo* in this court, not only the evidence introduced, but that offered, must be certified. (See Code, sec. 2742.) *Giltrap v. Watters*, 149.
11. TRIAL DE NOVO : CERTIFYING EVIDENCE. Where the abstract fails to allege, or show, that it is an abstract of all the evidence, a trial *de novo* cannot be had in this court. It is not sufficient that the certificates of the judge and reporter are printed in the abstract showing that all the evidence is contained in the report of the short-hand reporter. *Parks v. Garner*, 154.
12. TRIAL DE NOVO : RECORD : EVIDENCE. In order that an equity case may be tried *de novo* in this court, the abstract must show that it contains all the evidence offered and rejected below, as well as that introduced and received. Neither can a trial *de novo* be had when counsel for appellant, in their printed argument, admit that certain portions of the record which they regard as immaterial were omitted from the abstract. It is for this court alone, in such cases, to determine the admissibility of evidence offered, and the materiality of any portion of the record, and not for the court below in the one case, nor for counsel for appellant in the other. *Reed v. Larrison*, 399.
13. ——— : INSUFFICIENT RECORD. This being an equity case for trial *de novo*, and it appearing that the abstracts do not contain all the evidence, and that the translation of the short-hand reporter's notes was not filed in the court below within six months after the rendition of the judgment, no trial can be had in this court, and the judgment must be affirmed. *State v. Roenisch*, 379.
14. CRIMINAL CASE : EVIDENCE WANTING. The grounds of the appeal in this case require a consideration of the evidence, but appellee filed a paper denying appellants' abstract of the evidence on the ground that it was not made of record by a bill of exceptions, nor certified in any manner, which denial is not controverted, and must be taken as true. *Held* that the questions raised by the appeal could not be considered, and that the judgment should be affirmed. *State v. Kuhner*, 250.
15. CRIMINAL CASE : EVIDENCE WANTING. The appellant's abstract in this case having been challenged, and he having failed to show that all the evidence in the case is before this court, the questions whether the verdict is contrary to the evidence, or whether the court erred in giving instructions, cannot be determined. The instructions, being abstractly correct, are presumed to have been justified by the evidence. *State v. Moore*, 449.
16. QUESTIONS REVIEWED : EVIDENCE WANTING. Where the evidence is not set out in the abstract, this court cannot review alleged errors whose existence can be determined only by reference to the evidence; and in such case the judgment must be affirmed, because error must be shown by the record. (See opinion for illustration.) *Read v. Divilbliss*, 88.

17. **REVIEW: QUESTION NOT SUBMITTED TO JURY.** In an action for an injury on account of a defective sidewalk, the court in an instruction called the attention of the jury to the question of enhanced damages resulting from a fall subsequent to the accident, but not to such damages resulting from an improper use of the injured limb after the accident. The instruction was not excepted to, and no other was asked on the subject. *Held* that the instruction as given was the law of the case, and limits the inquiry of this court to the subject as presented by it, and prevents any inquiry as to whether she was negligent in the use of the injured limb after the injury. *Troxel v. City of Vinton*, 90.
18. **REVIEWING CONDUCT OF COUNSEL.** Complaint is made to this court of the argument of plaintiff's counsel to the jury, and the argument is printed at length in the abstract; but in the absence of a showing in the abstract that it was preserved by a bill of exceptions, or in some other way recognized by the statute and the practice of the courts, this court cannot consider the complaint. *Nelson v. Chicago, M. & St. P. Ry. Co.*, 405.
19. **THEORY OF TRIAL BELOW FOLLOWED.** A claim made in this court, in an action to establish and enforce a lien on land, that the defendant and appellant had conveyed her interest in the premises before the action was begun, and that therefore she has no further interest in the controversy, cannot be considered, where it appears from the record that the case was tried below on a contrary theory, and that theory was justified by the pleadings. *Stanbrough v. Daniels*, 561.
20. **REVIEWING DEMURRER: WHAT RECORD MUST SHOW.** A party desiring a review in this court of an order overruling a demurrer should elect to stand upon his demurrer, and have the record so show. It is not sufficient to have general exceptions noted at the end of a decree showing a trial on the merits. (Compare *Wilcox v. McCune*, 21 Iowa, 296.) *Id.*
21. **CONFLICTING EVIDENCE.** This court will not reverse a judgment upon a verdict based on conflicting evidence on the ground that there was not sufficient evidence to warrant the verdict. *Troxel v. City of Vinton*, 90.
22. **VERDICT: EVIDENCE TO SUPPORT.** Where the evidence is conflicting this court will not set aside a verdict as being unsupported by the evidence. *Deere v. Wolf*, 115.
23. **JUDGMENT ON CONFLICTING EVIDENCE.** This court will not reverse a judgment based on the finding of the district court in a law case, on the ground that the finding is not supported by the evidence, which is conflicting. *Dalhoff v. Bennett*, 140.
24. **DISMISSAL: FAILURE TO FILE ABSTRACT.** An appeal will not be dismissed on account of the appellant's failure to file an abstract within the prescribed time, where it appears that the appeal was taken in good faith, and not for delay, and that the delay in prosecuting it was in part unavoidable and in part by consent. (See chapter 56, Laws of 1874.) *McKay v. Woodruff*, 413.
25. **NO ARGUMENT FILED: DISMISSAL.** Where appellants file no brief or argument in this court, it will be presumed that they have abandoned their appeal, and it will be dismissed. *Raynor v. Raynor*, 282.
26. **DEFECTIVE ABSTRACT: DISMISSAL.** Where an appeal is properly perfected, it will not be dismissed on account of a defect in the record, but the judgment will be affirmed or reversed, as the record will justify. *Zimmerman v. Merchants & Bankers' Ins. Co.*, 850.

27. **ASSIGNMENT OF ERRORS : EQUITY CASE : TOO GENERAL.** Where an equity case appealed to this court cannot be tried *de novo* on account of a failure to certify all the evidence, it cannot be tried upon an assignment of errors which raises only the question as to what the court should find from the evidence; for that would only be a trial *de novo* under another name. *Giltrap v. Watters*, 149.
28. **EQUITY CASE : TRIAL AS LAW CASE.** An equity cause cannot be reviewed as a law case in this court when no errors have been assigned. *Reed v. Larrison*, 899.
29. **PRACTICE : QUESTION OF EQUITABLE JURISDICTION.** Upon the appeal to this court of an equity case, in the absence of any objection based upon the want of equitable jurisdiction by reason of the fact that there is a plain, adequate and complete remedy at law, this court will raise the objection of its own motion, and dismiss the petition. *Keokuk & N. W. Ry. Co. v. Donnell*, 221.
30. **CORRECT DECISION BASED ON WRONG REASON : INSTANCE.** In an action against a sheriff by a chattel mortgagee for seizing and selling the mortgaged property upon execution against the mortgagor, the mere fact that the district court gave as a reason for its judgment for defendant that the chattel mortgage was a part of a transaction which amounted to a general assignment, when the true reason was that the conveyances were void as fraudulent, but not possessing all the elements of a general assignment, does not entitle the plaintiff to a reversal; but if the established facts support the judgment, it should be affirmed. (See cases cited in opinion.) *Wise v. Wilds*, 586.
31. **AGREEMENT OF ATTORNEYS : EVIDENCE.** An alleged oral agreement on the part of counsel for appellees that the cause should be submitted to this court upon appellant's abstract, and that a transcript should be waived, cannot be established by the affidavits of appellants' attorney. (See Code, sec. 218, par. 2.) *Riegelman v. Todd*, 696.
32. **EVIDENCE WANTING : MOTION FOR NEW TRIAL FILED TOO LATE.** Where appellee's abstract contradicts appellant's, and is itself denied, but appellant fails to file a transcript, appellee's abstract must be taken as true, and when it thus appears that appellant's abstract does not contain an abstract of all the evidence, and shows that the motion for a new trial was not filed within the time prescribed by section 2838 of the Code, and it is not claimed that the time was extended for filing it, all questions which depend upon the evidence, or upon the motion for a new trial, must be disregarded. *Id.*
33. **AS TO FOUNDATION FOR APPELLATE PROCEEDINGS, AND JURISDICTION TO ENTERTAIN APPEALS,** see Appeal, 1-12; Bills of Exceptions, 1, 2.
34. **MITIGATION OF PUNISHMENT ON APPEAL,** See Criminal Law, 25, 26.
35. **WHEN QUESTIONS NOT RAISED BELOW WILL NOT BE CONSIDERED.** See Costs, 1.
36. **CLERK'S CERTIFICATE TO EXPLAIN RECORD.** See Criminal Law, 24.
37. **PRESUMPTIONS IN FAVOR OF TRIAL COURT.** See Criminal Law, 8, 27; Estates of Decedents, 4; Evidence, 19.

PRESCRIPTION.

See HIGHWAYS, 1; WATERS, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETIES.

PRIORITIES.

See ATTORNEYS AT LAW, 1; CHATTEL MORTGAGES, 1-3, 5; JUDGMENTS, 5, 9; JUDICIAL SALES, 1; MECHANICS' LIENS, 1, 3, 4; MORTGAGES, *passim*; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

PROMISSORY NOTES.

1. CONSIDERATION: BURDEN OF PROOF. Where in an action upon a promissory note the defendant relies upon a failure of consideration, he has the burden to establish such defense, since all written contracts import a consideration. (Code, sec. 2118.) *McCormick Harv. Mach. Co. v. Jacobson*, 582.
 2. CONSIDERATION. A man who innocently marries a woman, found to be pregnant at the time of marriage by another man, is not bound to live with her (Code, sec. 2224), nor to support the child; and an agreement to do these things is a good and valid consideration for a note given him on account thereof. *Brannum v. O'Connor*, 682.
 3. PROVISION FOR ATTORNEY'S FEES: RECOVERY. See Attorney's Fees, 1, 2.
 4. ENDORSEMENT BY WAY OF GIFT. See Gifts, 1.
- See GUARANTY, 1, 2; GUARDIANS, 1; MORTGAGES, 4, 5, 11; SURETIES, 1.

PROXIMATE CAUSE.

See DAMAGES, 1.

PUNISHMENT.

1. MITIGATION ON APPEAL. See Criminal Law, 25, 23.
2. OF PHARMACIST FOR SALE OF LIQUORS. See Intoxicating Liquors, 4.

QUIETING TITLE.

See PARTIES TO ACTIONS, 2; PRACTICE AND PROCEDURE, 2; RAILROADS, 8; REAL ESTATE, 3, 5; TAXES, 1.

QUO WARRANTO.

1. INJUNCTION TO AID. See Injunction, 4.
2. WHEN PROPER REMEDY. See Insurance, 1, 2; Schools and School Districts, 6.

RAILROADS.

1. **RIGHT OF WAY: APPLICATION FOR APPRAISEMENT: CONSTRUCTION.** Plaintiff's application to the sheriff to appraise his damages for right of way taken by the defendant for its road did not ask for the assessment of his damages to the particular lots named, but for the assessment of his damages to his lots, caused by the location of the road across particular lots, describing them. He owned all the lots in the block, but the road was located over a part of them only,—those particularly described. *Held* that the form of the application did not limit his claim to the damages to the lots particularly described. (*Waltemeyer v. Wisconsin, I. & N. Ry. Co.*, 71 Iowa, 626, *distinguished.*) *Cox v. Mason City & Ft. D. Ry. Co.*, 23.
2. ———: **LOTS IN BLOCK OWNED BY PLAINTIFF: DAMAGES.** Where all the town lots in a block were owned by plaintiff, and defendant located its road over some of them only, plaintiff was not limited in his recovery to the damage to the lots touched by the right of way, but was entitled to prove and recover the damage to the whole block. [REED, C. J., *dissenting.*] *Id.*
3. **PROMISE OF RIGHT OF WAY: QUIETING TITLE: EVIDENCE.** The evidence in this case shows that, before plaintiff's road was built over defendant's land, defendant promised that he would give the right of way therefor. While the road was not located relying upon this particular grant of right of way, it appears that the securing of the right of way generally was a condition to its location. *Held* that a decree quieting the title thereof in plaintiff was justified by the facts. *Cherokee & D. Ry. Co. v. Renken*, 816.
4. **RIGHT-OF-WAY DAMAGES: APPEAL: EVIDENCE.** Where defendant made application to the sheriff to appoint a jury to assess the damages which the owner of land would sustain by the appropriation of a right of way over certain government subdivisions, describing them, and the land-owner appealed from the award, and described the premises in his notice as they were described in the application, and the land so described was only a part of his farm, *held* that this did not preclude him from proving and recovering the damage to his whole farm from the appropriation of the right of way. (Compare cases cited in opinion.) *Dudley v. Minnesota & N. W. Ry. Co.*, 408.
5. ———: **INSTRUCTIONS.** Instructions to the effect that inconveniences in the use of a farm, and necessary dangers from fire, resulting from the appropriation of a right of way for a railroad over the farm, are to be considered, in estimating the owner's damages, only as they bear upon the market value of the farm after the appropriation, are *held* to be correct. (*Lance v. Railway Co.*, 57 Iowa, 636, *distinguished.*) *Id.*
6. ———: **EVIDENCE: ASSESSED VALUE.** While an assessor might be a very competent witness as to the value of a farm before and after it was crossed by a railroad, the valuation put upon it by him as assessor for successive years is not competent evidence, and the assessment rolls cannot be used for that purpose. *Id.*
7. ———: **EXCESSIVE VERDICT.** A verdict of \$1,700 for damages to a farm of three hundred and eighteen acres, where some of the witnesses testified that the farm was damaged to the extent of ten dollars per acre, cannot be said to be excessive. *Id.*

8. **NEGLIGENT FIRES: PLEADING.** A petition which alleged that the fire causing the injury complained of was set out by the defendant in the operation of its road stated a cause of action, without averments of negligence on defendant's part; for in such case negligence is presumed until the contrary is shown. (See cases cited in opinion.) *Seska v. Chicago, M. & St. P. Ry. Co.*, 187.
9. ———: **NEGLIGENCE: EVIDENCE.** In such case, the fact that the fire was set out in the operation of the road was *prima-facie* evidence of negligence, and whether this *prima-facie* evidence was overcome by the evidence of care exercised by defendant was a question for the jury, with whose finding this court cannot interfere. (See cases cited in opinion.) *Id.*
10. **FIRES FROM ENGINES: RULE OF CONTRIBUTORY NEGLIGENCE DOES NOT APPLY.** In an action against a railroad company for damages caused by fire set out on its right of way by an engine, the defendant cannot escape liability for its own negligence, even though it appears that the plaintiff was negligent also, and that his negligence contributed to the loss. Under section 1289 of the Code, the doctrine of contributory negligence does not apply. (*Small v. Railway Co.*, 58 Iowa, 838, *distinguished.*) This point was affirmed upon a rehearing. *West v. Chicago & N. W. Ry. Co.*, 654.
11. ———: **INSTRUCTION AS TO EVIDENCE.** In such case the court instructed: "If you find from the evidence that the engine which set out the fire set out several successive fires on the same day and same trip, this should be regarded as evidence that the engine was not properly constructed, or in good repair, or was improperly used." *Held* that it was not open to the objection that it went too far in instructing as to the effect of the evidence: nor to the objection that it referred to "several" successive fires,—since the evidence showed that there were two besides the one complained of; nor to the objection that the court erred in singling out this evidence, and thus giving it emphasis,—although the practice of so doing is ordinarily not to be commended. *Id.*
12. ———: **OWNERSHIP OF BURNED HAY: EVIDENCE.** Where in such action the property burned was stacks of hay, and the evidence was conflicting as to whether plaintiff was the sole owner of it; it was the duty of the jury to determine the conflict and render a verdict, though there might be some doubt about it; and an instruction that the plaintiff could not recover if the evidence left that question in doubt was properly refused. *Id.*
13. **NEGLIGENT FIRES: PRESUMPTION OF LIABILITY. PLEADING AND PROOF.** When an injury has been occasioned by fire set out in the operation of a railroad, the presumption is that the company is guilty of negligence (Code, sec. 1289; *Small v. Railway Co.*, 50 Iowa, 838); or, in other words, that it is liable for the injury. Hence, in an action to recover for such injury, it is only necessary to allege and prove the injury and that it was caused by a fire so set out; and an allegation of negligence in the petition is merely redundant matter, and need not be proved. (Code, sec. 2729.) And after plaintiff has so alleged and proved, it is incumbent on the defendant not only to show want of negligence on its part in the operation of its road, but also in the matters which were the immediate cause of the injury,—as, for example, in keeping its right of way free from dry grass, in which the fire, in this case, started. *Engle v. Chicago, M. & St. P. Ry. Co.*, 661.
14. ———: **CONTRIBUTORY NEGLIGENCE: INSTRUCTION.** In an action to recover for an injury caused by a fire set out by a locomotive, the court instructed as follows: If plaintiff's own negligence

directly and proximately contributed to his own injuries, then he cannot recover; but, in order to defeat his right of recovery, there must be such contributory negligence on his part as directly and proximately contributed to produce the injuries, and without which his loss would not have been sustained." *Held* that, while the last clause of the instruction may not express the rule as settled by the holdings of this court, it could not have prejudiced defendant, since it was held in *West v. Railway Co.*, *ante*, p. 654., that, under section 1289 of the Code, the right of recovery in a case of this kind would not be defeated by the mere contributory negligence of the injured party. *Id.*

15. ———: DEGREE OF CARE REQUIRED: INSTRUCTIONS. The presumption of law, that where an injury is done by a fire set out in the operation of a railway the company is guilty of negligence, is overcome by proof that the company was in the exercise of ordinary care and diligence, and although from one clause of an instruction the jury might have inferred that the company was liable for the consequences of but slight negligence, yet where the whole taken together expressed the correct rule, and it was clearly set forth again in another instruction, the clause referred to is no ground for a reversal. *Id.*
16. NEGLIGENT FIRES: EVIDENCE OF ORIGIN. Where the evidence showed that, after defendant's engines had passed, the fires were discovered in the grass, and it was not shown that they could have arisen from any other source, the jury was warranted in finding that they were caused by the engines. *Johnson v. Chicago & N. W. Ry. Co.*, 666.
17. ———: EVIDENCE AS TO CONDITION OF ENGINES. When one of defendant's witnesses testified that an engine in good repair could not throw fire the distance from the track to the place the fire caught in the grass, and the fires could have originated from no other source, the jury was warranted in finding that the engines which passed just before the fire were out of repair. *Id.*
18. ———: CONTRIBUTORY NEGLIGENCE OF PERSON INJURED. The rule that contributory negligence will defeat a recovery for an injury, as recognized by this court, does not, under section 1289 of the Code, apply to a person injured by a fire set out in the operation of a railroad. (See *West v. Railway Co.*, *ante*, p. 654.) *Id.*
19. COW KILLED ON TRACK: WILFUL ACT OF OWNER: CODE, SEC. 1289. Plaintiff's cow, being at large, was on defendant's unfenced track. Defendant's employes on an approaching train rang the bell, sounded the whistle, applied the brakes, and did all in their power to stop the train and prevent a collision with the cow, but were unable to do so. Plaintiff was present and saw the condition of things, and had the time and ability to drive the cow from the track, and thus prevent the collision and the consequent death of the cow, but he made no effort to do so. *Held* that the death of the cow was "occasioned by the wilful act of the owner within the meaning of section 1289 of the Code, and that he could not recover of the company. *Moody v. Minneapolis & St. L. Ry. Co.*, 29.
20. INJURY TO MARE AT CATTLE-GUARD: EVIDENCE TO SUPPORT VERDICT. Plaintiff sues for the value of a mare which was found lying about six feet from a cattle-guard on defendant's road so seriously injured that she died the next day. The jury found that she was struck by a train, or frightened by an engine so that she ran into the cattle-guard, and so was injured. The evidence to sustain such finding was all circumstantial (see opinion), while defendant's employes testified that no such accident occurred. *Held* that, while the

preponderance of the evidence, as it appears in print, seems to be against the finding of the jury, yet this court cannot say that the jury was not warranted in so finding, nor that the trial judge erred in overruling a motion for a new trial; since they saw and heard the witnesses, and were better able to judge of the weight that should be given to their testimony. *Cox v. Burlington & W. Ry. Co.*, 478.

21. **INJURY TO EMPLOYEES: NEGLIGENCE: EVIDENCE.** Plaintiff sues for injuries received by being struck with a crank of a windlass used in connection with a ditching machine. The negligence charged consisted in a co-employee's releasing the brake without warning to plaintiff. It is apparent that if he had been so warned he would not have been injured. There was evidence tending to show due care on plaintiff's part, and negligence on the part of the co-employee, so that a verdict for plaintiff cannot be set aside in this court. *Nelson v. Chicago, M. St. P. Ry. Co.*, 405.

22. **INJURY TO EMPLOYEE: NEGLIGENCE: LEAVING PIN ON PLATFORM: UNFORESEEN RESULT: EVIDENCE.** Plaintiff, being with others employed in repairing one of defendant's bridges, withdrew a short distance to allow a passenger train, running at the rate of about thirty miles an hour, to pass. As it passed, an old, rusty and bent coupling pin was hurled by a wheel of a car, striking plaintiff on the head and causing the injury complained of. The evidence (see opinion) showed that the pin was not on the bridge, and justified the jury in concluding that it was lying loose upon a platform of one of the cars. The pin had a hole in the head for a chain, and was such as was used upon cars having Miller's platform, which was on the cars in the train causing the accident; but the pin was not chained to the platform. *Held* that to allow it to lie loose upon the platform was negligence, because it was liable to fall and become an obstruction on the track, and that defendant was liable for such negligence in this case, even though the precise accident and injury which occurred could not have been foreseen and expected from the falling of the pin from the platform. *Doyle v. Chicago, St. P. & K. C. Ry. Co.*, 607.

23. **THE SAME: EVIDENCE:** In such case a brakeman upon the train was asked if, in case a coupling-pin should roll off a platform, he would expect any extraordinary force would be given to it, so that it would do injury. *Held* that the answer sought was immaterial, and that an objection on that ground was properly sustained. *Id.*

24. **THE SAME: EVIDENCE.** In such case the court rightly rejected evidence offered to show that the only reason for chaining the pins to the platform was that they might be at hand when wanted,—the question being solely as to defendant's duty, and not as to its motive for doing it. *Id.*

25. **INJURY TO CONSTRUCTING ENGINEER: RISKS ASSUMED.** A civil engineer engaged in the construction of a railroad track, but not responsible for the condition of the track after it is laid, assumes, by virtue of his employment, the risks incident to the operation of construction trains upon the new track when operated in a reasonably prudent and careful manner. But where he is injured by the derailment of such train through the company's negligence in caring for and keeping in place the new track, and in running over a sunken and miry track at a rate of speed which is dangerous, considering the condition of the track, the company is liable. *Meloy v. Chicago & N. W. Ry. Co.*, 743.

26. ———: NEGLIGENCE: EVIDENCE. In such case evidence that other trains were run over the track at the same rate of speed on the same day was not admissible for the purpose of showing that there was no negligence in running the train in question; nor was it prejudicial error to exclude it when offered to show that the company had no notice of the condition of the track, since such notice was abundantly proved by other evidence which this could not overcome. *Id.*
27. ———: DANGEROUS RATE OF SPEED: EVIDENCE. Although no witness testified that the speed of the train in question was so great as to be dangerous, the condition of the track was described to the jury as full of short curves, uneven and miry, and at one place sunken out of sight in the mud, and the rate at which the train was run was in evidence. *Held* that from such evidence the jury was justified in passing on the question as to whether the rate of speed was dangerous or not, without the aid of expert or direct testimony. *Id.*
28. ———: CONTRIBUTORY NEGLIGENCE: CASE FOR JURY. The train in question consisted of a wrecking car, which was next to the engine, an old caboose, used for a tool car, which came next, and in which plaintiff and others of a wrecking crew were riding, three flat cars loaded with rails, three more loaded with ties, and a box car fitted up as a way car, which was at the rear end of the train. Had plaintiff been in the box car he would not have been injured. But it does not appear that plaintiff had any reason to suppose that the box car was a stronger or safer car to ride in than the caboose or tool car, and, so far as the evidence shows, it was no better adapted to the use of travelers than was the tool car, and was less convenient. Besides, the evidence tended to show that plaintiff was on this occasion one of a wrecking crew, and rode in the place provided for them. *Held* that he was not as matter of law guilty of contributory negligence in riding in the tool car, and that the question was properly submitted to the jury. (*Doggett v. Railway Co.*, 34 Iowa, 284, and *Player v. Railway Co.*, 62 Iowa, 617, distinguished.) *Id.*
29. EJECTION OF PASSENGER: MEASURE OF DAMAGES: INSTRUCTION. In this action for damages for being wrongfully ejected from defendant's train, the court instructed: "When a passenger is wrongfully compelled to leave a train, and suffer insult and abuse, the law does not exactly measure his damage, but it authorizes the jury to consider the injured feelings of the party, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such sum as the jury may say is right." *Held*, especially in view of the whole charge, that this instruction was not subject to the objection that it authorized an allowance of exemplary damages; because damages may properly be allowed for mental suffering caused by indignity and outrage, whether connected with physical suffering or not, and such damages are compensatory, and not exemplary. *Shepard v. Chicago, R. I. & P. Ry. Co.*, 54.
30. INJURY BY FRIGHTENING TEAM: KINDS OF NEGLIGENCE TO BE CONSIDERED. Plaintiff's team was frightened and he was injured, while attempting to drive past defendant's engine which was standing in the street of a town. The horses were frightened by a discharge of steam as they were passing. *Held*, in an action to recover, that the court properly refused to restrict the jury to the consideration of defendant's negligence in discharging the steam, and submitted to them the question of negligence in keeping the engine on the street for an undue time. *Andrews v. Mason City & Ft. D. Ry. Co.*, 669.

81. ———: CONTRIBUTORY NEGLIGENCE: EVIDENCE. In such case, where there was a legitimate inquiry as to whether plaintiff ought not, as a prudent man, to have taken another route by crossing the track, the court properly admitted evidence as to the height of the track at the place where it was claimed he ought to have crossed. *Id.*
82. ———: FIREMAN IN CHARGE OF ENGINE: EVIDENCE: INSTRUCTION. Where the evidence was that the engineer was absent from the engine at the time of the injury, and that, when he went away he said to the fireman, "Watch her,"—the engine at the time standing in the street of a town,—and the fireman while "watching her" discharged the steam which frightened plaintiff's horses and caused the injury, *held* that the jury was justified in finding that he was in charge of the engine, though the engineer testified that he was not left "in charge;" and that the court was justified in instructing that defendant was liable if the fireman, while so in charge, negligently discharged the steam. *Id.*
83. TAX IN AID OF: COLLECTION. See County Treasurer, 1, 2.
84. OBSTRUCTION OF STREET BY. See Criminal law, 19, 20.
85. RIGHT OF WAY: ENJOINING CONDEMNATION PROCEEDINGS. See Injunction, 1.
86. PURCHASE OF RIGHT OF WAY BY TOWN COUNCIL: FRAUD: ULTRA VIRES. See Cities and Towns, 3-6.

RAPE.

See CRIMINAL LAW, 26.

REAL ESTATE.

1. TENANTS IN COMMON: RECOVERY OF RENT BY ONE AGAINST THE OTHER. Where land is owned by tenants in common, and is occupied exclusively for a number of years by a part of them only, and there is no agreement to pay rent, and no demand for possession is made of the occupying tenants and refused, and they have received no rent from third persons, they are not liable to pay rent to their co-tenants who have not been in possession. (See opinion for cases followed.) *Belknap v. Belknap*, 71.
2. TITLE NOT YET EARNED: EQUITABLE AID. Plaintiff agreed with defendants, his daughter and her husband, that they should occupy and cultivate his farm during the lifetime of him and his wife, and give them such care and support as they might need, and that, in consideration thereof, the daughter should have an undivided one-half interest in the farm. *Held* that the daughter did not become the equitable owner of such half interest during the lifetime of her parents, because the conditions on her part were not yet fully performed, and that equity could not decree her to be the equitable owner of such interest. *Flower v. Cruikshank*, 110.
3. CONTRACT TO SUPPORT PARENTS FOR INTEREST IN: DISAFFIRMANCE: EQUITY. In this case the evidence shows a contract to support parents in consideration of an interest in real estate. Plaintiff, one of the parents, and the owner of the land, did not claim a breach of the contract, nor a disaffirmance of it, but that no such contract had been made. *Held* that, whatever his right to disaffirm it might be, since he had not done so, and did not allege any breach of it on the part of defendants, it remained in full force, and equity could not disregard it and grant plaintiff a decree quieting his title in the land and giving him possession thereof, the defendants being entitled to such possession under the contract. *Id.*

4. **SALE OF : DEPOSIT AS SECURITY AGAINST JUDGMENT LIEN : WHO ENTITLED TO : REDEMPTION.** W. procured title to land under a mortgage foreclosure to which plaintiff, the owner of a junior judgment, was not made a party. W. sold the land to N., and to secure N. against the junior judgment a portion of the purchase price was left as a deposit in the hands of K. Plaintiff in this action seeks to recover that sum in payment of his judgment. W., by a cross-bill, asks that plaintiff be required to redeem from the foreclosure sale, and that, on failure so to do, his right to redeem be barred. *Held—*
 - (1) That, in the absence of proof that the money was left with K. for the plaintiff, or with directions to pay it on the judgment, plaintiff could not recover it.
 - (2) That W. had a right, though he had sold the land, to maintain the cross-action to compel or bar a redemption, and that the relief asked in the cross-petition was properly granted. *Anderson v. Wyant*, 498.
 5. **OCCUPYING CLAIMANT : RELIEF IN EQUITY.** Defendant built a house on lots owned by another, with the understanding that a contract of sale to defendant might be completed, which was never done, and the owner of the lots sold them to H. for the value of the lots without the house, and H. sold to plaintiff for a still smaller sum, —defendant all the time being in possession, and H. and plaintiff both purchasing with full knowledge of the facts. In this action to quiet title in plaintiff, *held—*
 - (1) That the title of the lots should be quieted in it, but that defendant should have leave to move the house within thirty days.
 - (2) That equity had power to grant full relief, and that the law for the benefit of occupying claimant did not furnish the only remedy for defendant. *Green Bay Lumber Co. v. Ireland*, 636.
 6. **ACCOUNTING FOR RENTS AND PROFITS.** See Mortgages, 2 ; Tax Sale and Deed, 10.
 7. **POSSESSION AS NOTICE TO SUBSEQUENT PURCHASERS.** See Schools and School Districts, 8.
 8. **SALE OF FOR TAXES.** See Tax Sale and Deed.
 9. **CONTRACTS FOR SALE OF.** See Vendor and Vendee.
 10. **SALE OF LAND : GROWING CROPS.** See Chattel Mortgages, 8, 4.
- See LANDLORD AND TENANT, 1, 2 ; MORTGAGES ; SPECIFIC PERFORMANCE, 1.

RECEIVERS.

See CHATTEL MORTGAGES, 1.

RECORD.

1. **OF CONVEYANCES, ETC.** See Chattel Mortgages, 2, 8.
2. **ON APPEAL TO SUPREME COURT.** See Appeal, and Practice in Supreme Court.

REDEMPTION.

See JUDICIAL SALES, 1; MECHANIC'S LIENS, 1; MORTGAGES, 9, 10; REAL ESTATE, 4; TAX SALE AND DEED, 1.

REFORMATION OF INSTRUMENTS.

See DEEDS, 2, 5.

RELEASE AND DISCHARGE.

See ATTACHMENT, 2-4.

REPLEVIN.

1. WHEN DEMAND NOT NECESSARY AS CONDITION TO ACTION. Where a petition in replevin stated that defendant, under a chattel mortgage, which was void, took the mortgaged property against plaintiff's protest and opposition, amounting almost to actual resistance,—the property being the same as that sought to be recovered in the action,—*held* that it was error to order a verdict for defendant because there was no allegation of a prior demand, for, if the allegations were true the taking was wrongful, and no demand was necessary. *Ruiter v. Plate*, 17.
2. DEFENDANT NOT IN POSSESSION: EVIDENCE. In an action of replevin, defendant asked the court to direct a verdict for defendant on the ground that the uncontroverted evidence showed that the property was not in defendant's possession when the suit was begun; but the only evidence tending so to show was defendant's statement that in dividing his property, long after he had refused to deliver the team in question to plaintiff on demand, his son got it. *Held* that the court rightly refused to direct a verdict for defendant. *Briggs v. McEwen*, 808.

RES ADJUDICATA.

See FORMER ADJUDICATION.

RESCISSION.

See DEEDS, 8; VENDOR AND VENDER, 5.

SALES.

1. WARRANTY OF SOUNDNESS OF ANIMALS SOLD: BREACH: CONTAGIOUS DISEASES: DAMAGES. If animals sold are warranted by the vendor to be sound and free from disease in general, and are not so in fact, but are affected with a contagious disease, the warrantor is liable not only for the difference between the warranted and actual value of the animals, but for the loss occasioned, without fault on the part of the purchaser, by the communication of the disease to other stock with which the diseased animals are properly placed in the ordinary course of business, and also for such other damages and expenses as are the direct and natural result of the breach of the warranty; and it is not material that the warrantor does not know that the warranty is false, nor that it does not specify any kind or class of diseases. (See opinion for authorities.) [REED, C. J., dissenting.] *Joy v. Bitzer*, 73.

2. **DELIVERY AND POSSESSION: SUBSEQUENT PURCHASER: QUESTION FOR JURY.** In order that a purchase of personal property, without a recorded bill of sale, may be good as against a subsequent purchaser from the same vendor, the first purchaser must have such possession as is visible, apparent and actual to strangers to the transaction. (Compare *McAfee v. Busby*, 69 Iowa, 328.) In this case, *held* that the circumstances, as shown by the evidence (for which see opinion), did not, as matter of law, show such possession on the part of defendant, who was the first purchaser, and that the question should have been submitted to the jury. *Horsley v. Hairsine*, 141.
3. **GOODS MADE TO ORDER: DEFENSE: PLEADING.** Action for the price of certain patterns alleged to have been made for and delivered to defendant upon his order. Defendant answered that "said patterns were not reasonably fit and proper for the purpose for which plaintiff made them, and were not reasonably fit and proper for use in defendant's business," and were not in shape, form and style as requested by defendant. Plaintiff moved to strike out that portion of the answer enclosed in quotation marks above, but the motion was overruled. *Held* no error, though the court instructed the jury that the only question of fact was, Were the patterns made as ordered by defendant. *White v. Adams*, 295.
4. **CONDITIONAL: GARNISHMENT OF VENDEE.** Where a sale is made on condition that the title shall not pass until payment is made, and the property is delivered before payment, and the vendee is garnished as the debtor of the vendor, and therefore refuses to pay, there is no sale, and the garnishment is no defense to an action by the vendor to recover the property. *Briggs v. McEwen*, 303.
5. **ACCEPTANCE OF GOODS: FACTS CONSTITUTING: PRESUMPTION.** Where a person purchases goods of a certain description for future delivery, and upon receiving them discovers a defect, and informs the vendor thereof, who satisfactorily rectifies it, the vendee will thereupon be regarded *prima facie* as fully accepting the goods; and before he will be permitted to return the goods upon the discovery of other defects, he will be required to rebut the presumption of a full acceptance upon the curing of the first defect. In other words, a purchaser will not be permitted to make separate demands, founded upon partial inspections of the goods, in the absence of a sufficient excuse therefor. *Wineland v. Jones*, 401.
6. **OF LANDS.** See Deeds; Real Estate, 2-5; Vendor and Vendee.

SCHOOLS AND SCHOOL DISTRICTS.

1. **SCHOOL DISTRICTS: PAROL TO CONTRADICT RECORDS OF: COLLATERAL ATTACK.** Parol evidence in a collateral proceeding cannot be received to contradict the records of a public corporation required by law to be kept in writing, or to show mistake therein. (See authorities cited in opinion.) Accordingly, in an action on a money obligation of a school district, which the records of the annual meeting of the electors, and of a subsequent meeting of the directors, showed to have been issued upon the authority of those bodies, *held* that the testimony of electors was inadmissible to show that no such action was taken at the annual meeting, and that parol evidence was properly excluded tending to impeach the validity of the record of the board of directors, on the ground that it was made by an interested member of the board, who was not its secretary. *Everts v. Dist. Twp. of Rose Grove*, 37.

2. ———: RATIFICATION OF ACTION OF BY ELECTORS. A contract made by a school district, which it might lawfully have made by authority of the electors at their annual meeting, becomes binding upon the district after ratification by the electors, though originally made without such authority. *Id.*
3. ———: POSSESSION OF SCHOOL-HOUSE SITE: NOTICE TO SUBSEQUENT PURCHASERS. The possession by a school district of a school-house site, under contract with the owner of the land, is notice to subsequent purchasers of its rights, and it is not divested of those rights by the transfer, without reservation, of the tract of which the site is a part. *Id.*
4. ———: SETTLEMENT OF DISPUTED CLAIM: CONSIDERATION. The settlement of a disputed claim between a school district and a claimant is a good consideration for an order of the district to pay a sum of money, agreed in the settlement to be paid in satisfaction of the claim. *Id.*
5. INDEPENDENT DISTRICTS: NUMBER OF DIRECTORS TO BE ELECTED. Independent school districts having a population of five hundred or more are entitled to six directors,—two to be elected each year; and those of a smaller population to three directors only,—one to be elected each year. (Code, secs. 1802, 1808.) *Held* that, where such a district has had six directors, and the requisite population to justify that number, but the population has been reduced so as to fall below five hundred, it is entitled to elect only one director each year. *State v. Simpkins*, 676.
6. ———: TOO MANY DIRECTORS: QUO WARRANTO: PARTIES. Where two directors are elected in one year in an independent district having a population of less than five hundred, while the law provides for the election of one only, it cannot be said that either is legally elected, and an action of *quo warranto* will lie against them both, as individuals, to test their right to the office, without making the district, or its inhabitants or directors, parties thereto. *Id.*

SEDUCTION.

1. VOLUNTARY SUBMISSION: INSTRUCTION. In an action for seduction, an instruction that if plaintiff voluntarily yielded to defendant's desires, she cannot recover, is not prejudicial to defendant, but rather favorable. *Baird v. Boehner*, 622.
2. EXCESSIVE VERDICT: APPEAL. The trial court refused to set aside a verdict for sixty-seven hundred and fifty dollars for the seduction of an unmarried woman. *Held* that this court could not interfere, in the absence of any indications of passion or prejudice on the part of the jury. *Id.*
3. EVIDENCE OF FORMER INTIMACIES. In an action for seduction, plaintiff was allowed to show that after she had submitted to defendant's desires she determined to reform, and to that end absented herself for some months, and that after her return defendant resumed his intimacy and she again yielded. *Held* that evidence of their relations before she went away was admissible as showing the extent of his control over her, and the manner in which he acquired it. *Id.*
4. EVIDENCE: TIME OF PREGNANCY. In such case it was certainly competent for plaintiff to show that she became pregnant, and, if so, to show when it occurred. *Id.*

SETTLEMENT.

1. MISTAKE IN. See Guaranty, 2.
2. OF DISPUTED CLAIM: CONSIDERATION. See Schools and School Districts, 4.

SET-OFF.

JUDGMENT AND COSTS. Where a judgment recovered by plaintiff in one case was properly set-off against her note which was in litigation in another case in the same court, it was proper that the costs recovered by her in the first case should also be set-off against the note. *Otcheck v. Hostetter*, 509.

See ESTATES OF DECEDENTS, 2.

SHERIFF.

See ATTACHMENT, 2, 4, 11; CHATTEL MORTGAGES, 2.

SIDEWALKS.

See CITIES AND TOWNS, 2.

SPECIFIC PERFORMANCE.

SALE OF LAND: BAD FAITH OF PURCHASER: EVIDENCE. The evidence in this case, though conflicting (see opinion), *held* to show that defendant left the land in question with W., a real-estate broker, to be sold on commission; that he had reason to believe, and did believe, that W. and plaintiff were members of the same firm, and that it was the firm, and not W. alone, that was to sell the land; that at all events W. and plaintiff had been partners, and were at the time on very intimate terms, and mingled more or less in land and other business; that W. contracted the land to plaintiff for a very inadequate price, and that defendant executed the contract without reading it, or knowing that plaintiff was the purchaser, after he had been offered a greater price, on the statement of W. that to refuse to execute it would cause litigation. After he learned that plaintiff was the purchaser he refused to make the deed, and this action is to compel specific performance. *Held*—

- (1) That plaintiff was not a purchaser in good faith, and could not have the aid of equity to consummate his attempted fraud.
- (2) That, although the evidence of the fraud might not be sufficiently strong to justify a court in setting aside the contract on that ground, the same degree of evidence is not essential to justify the refusing to plaintiff the relief asked, since such relief is largely discretionary with the court, and depends chiefly on the good faith of the party asking it.
- (8) That defendant's negligence in not reading the contract did not justify an order for specific performance notwithstanding plaintiff's bad faith. *Clark v. Maurer*, 717.

See VENDOR AND VENDEE, 4.

STATUTES.

1. CURATIVE ACTS: VALIDITY. See Constitutional Law, 1
2. CONSTITUTIONALITY. See Constitutional Law, 1-4.
3. REMEDIAL: APPLICATION TO PENDING SUITS. See Intoxicating Liquors, 11.

STATUTES CITED, CONSTRUED, ETC.

[The words in Roman type indicate the subject under consideration, and the figures following refer to the page in this volume where the statute is cited.]

CODE OF 1851.

- Sec. 637. Streets: Effect of recording town plat. 70.
 Sec. 977, 978. Assignment for creditors: Assent of creditors presumed. 109.

LAWS OF 1853.

- Chap. 93. Bridges over navigable rivers. 642.

REVISION OF 1860.

- Sec. 312. Powers of supervisors: Bridges over navigable streams. 643.
 Sec. 1214, 1215. Toll-bridges over navigable streams. 643.

CODE OF 1872.

- Sec. 183. Judgment rendered in vacation. 429; Or at next term. 534.
 Sec. 197, par. 8. Index of all liens. 333 *et seq.*
 Sec. 212, par. 2. Parol to prove agreement of attorneys. 697.
 Sec. 303. County supervisors: Powers: Bridges. 641, 643.
 Sec. 393. Township trustees: Cemeteries. 287.
 Sec. 415. Township trustees: Powers of as board of health. 287.
 Sec. 771. Deputy county treasurer: Employment: Compensation. 346.
 Secs. 832, 836, 837, 841. Taxes: Equalization by supervisors: Duty of auditor. 223.
 Sec. 845. Tax sale: For taxes not carried forward: Void. 437, 695, 712.
 Sec. 876. Tax sale: Part of tract for whole tax. 604.
 Sec. 894. Tax sale: Notice to redeem: Who to make proof of service. 713.
 Secs. 908, 909. Default of county treasurer: Liability of county to state. 539.
 Sec. 936. Highway: Establishment: Notice. 641.
 Sec. 959. Highways: Notice of appeal: On whom served. 252.
 Sec. 1001. Bridges are part of highway. 641.
 Sec. 1003. Toll bridges. 643.
 Sec. 1031. Railroad bridges over boundary rivers. 643.
 Sec. 1078. Stockholders: Liability to assessments. 24.
 Sec. 1154. Foreign insurance companies: Restrictions upon. 652.
 Sec. 1265. Railways: Rights of in crossing streams. 643.
 Sec. 1289. Railroads: Injury to stock: Wilful act of owner. 30; Negligent fires: Effect of contributory negligence. 656, 663, 668.
 Secs. 1453, 1454. Trespassing animals: Notice to whom. 602.
 Secs. 1525, 1540-1543. Liquor nuisances: Registered pharmacists. 197 *et seq.*
 Sec. 1558. Intoxicating liquors: Fines: Liens on real estate. 451.

- Secs. 1802, 1808. Schools: Independent districts: Number of directors. 679, 680.
 Sec. 1990. Homestead: Alienation. 734.
 Sec. 2108. Surety: Notice to sue principal. 15.
 Sec. 2113. Written contract: Consideration: Pleading. 584, 742.
 Secs. 2115, 2116. Assignment for creditors: Assent of creditors presumed. 109.
 Sec. 2129. Mechanic's lien: Defeated by collateral security. 708.
 Sec. 2133 (as amended). Mechanic's lien: Delay in filing statement: Effect. 709.
 Sec. 2224. Husband and wife: Pregnancy by another before marriage. 635.
 Secs. 2386-2388. Estates of decedents: Sale of property to pay debts. 490.
 Secs. 2402-2404. Estates of decedents: Administrator's right to rents. 490.
 Secs. 2418-2420. Estates of decedents: Credits: Set-off. 493.
 Secs. 2420, 2421. Estates of decedents: Claims: Statute of limitations. 507.
 Sec. 2440. Dower: Cut off by sale in partition. 842.
 Sec. 2514. Wrong forum: Remedy. 169.
 Secs. 2529, 2533. Judgment creditor's right to redeem: Duration: Absence of senior lien holder from state. 647.
 Sec. 2535. Statute of limitations: Minors. 375.
 Secs. 2543, 2544. Parties to actions: Trustee without interest. 357.
 Secs. 2547, 2551. Right to bring in necessary parties to suit. 735.
 Secs. 2548, 2551. Parties to actions. 344.
 Sec. 2552. County treasurer's bond: Who may sue on. 539.
 Sec. 2618. Partition: Service by publication. 341; When such service not authorized. 360.
 Sec. 2623. *Lis pendens*: Notice. 424.
 Secs. 2635, 2636, 2639. Time for filing pleas. 339.
 Sec. 2729. Pleading: Redundant matter: Proof. 663.
 Sec. 2739. Admission of signature not denied. 62, 584.
 Sec. 2742. Appeal: Equity cases: Evidence. 124, 125, 150.
 Sec. 2789. Bill of exceptions: Time for filing. 429.
 Secs. 2807, 2808. Special verdict: Special interrogatory: Distinction. 293.
 Sec. 2831. Exceptions in justice's courts: When to be taken. 284.
 Sec. 2833. Motion for new trial: When to be made. 693.
 Sec. 2844. Right of co-plaintiff to dismiss: Partition. 725.
 Sec. 2849. Judgment: What is. 26.
 Sec. 2883. Judgments: When liens on real estate. 452, 646.
 Secs. 2883-2885. Judgment: Lien: Transcript: Filing. 335 *et seq.*
 Sec. 2951, par. 12. Attachment: False pretenses: Application of statute. 596.

Secs. 3019, 3020. Attachment: Appeal: Dissolution by delay. 585.
 Sec. 3090. Sheriff's sale vacated: Money to be refunded. 866.
 Secs. 3135-3137, 3146, 3148. Execution: Examination of debtor: Arrest upon order of referee. 293 *et seq.*
 Sec. 3155. Petition for new trial: Procedure. 505.
 Secs. 3163, 3164. Appeals: From what decisions taken. 26, 173.
 Sec. 3168. Appeal: Questions not raised in trial court. 631, 632.
 Sec. 3178. Appeal: Jurisdiction: Amount. 19, 330; Time for taking. 448.
 Sec. 3174. Appeals: Parties: Who to have notice. 344, 345.
 Sec. 3178. Appeals: How taken. 26.
 Sec. 3182. Appeal: Delay in filing transcript: Dismissal. 414.
 Sec. 3194. Appeal: From right judgment based on wrong reason. 591.
 Sec. 3196. Appeal: Judgment reversed: Restitution of money paid. 396.
 Sec. 3307. Assignment of error: Too general. 150.
 Sec. 3316. *Certiorari*: When not available. 650.
 Sec. 3345. *Quo warranto*: When proper remedy. 651, 680.
 Sec. 3391. Water: Liability of upper owner contributing to pollution. 579.
 Secs. 3507, 3511, 3517. Justices' courts: Jurisdiction: Attachment. 445 *et seq.*
 Sec. 3516. Practice in justices' courts. 234.
 Sec. 3535. Justices' courts: Duty when title to real estate is involved. 452.
 Secs. 3567, 3568. Justices' judgments: How made liens on real estate. 452.
 Sec. 3570. Justices' judgments: No execution against real estate. 452.
 Sec. 3575. Justices' judgments: Right of appeal. 527.
 Secs. 3609, 3610. Justices' courts: Attachment: Posting notices. 445 *et seq.*
 Secs. 3611, 3614. Forcible entry and detainer: Notice to quit: Time. 469, 630.
 Sec. 3620. Justices' courts: Duty when title to real estate is involved. 452.
 Sec. 3636. Criminal law: Defendant's failure to testify: Practice. 560.
 Sec. 3639. Evidence: As to contract with one deceased. 783.
 Secs. 3639, 3641. Competency of witnesses. 17.
 Sec. 3733. Depositions: Notice of taking: On whom served. 705.
 Sec. 4305. Indictment: Sufficiency. 197.
 Sec. 4374. Change of venue in criminal cases. 212, 423.
 Sec. 4496. Time for pronouncing sentence. 271.
 Sec. 4512 *et seq.* Execution in criminal cases. 415.
 Sec. 4609. Justices' judgment for fines: How made liens on real estate. 452.
 Sec. 4712. The pardoning power. 415.

LAWS OF 1874.

Chap. 56. Appeal: Delay in prosecuting: Dismissal. 414.

LAWS OF 1876.

Chap. 47, sec. 4. Taxation of land in cities. 556.
 Chap. 100, sec. 9. Mechanic's lien: Prior encumbrance: Procedure. 848, 709.
 Chap. 123, sec. 4. Railroad aid tax: Duty of county treasurer. 537, 539.

LAWS OF 1880.

Chap. 85. Levees: Assessment of costs: Appeal. 614.
 Chap. 109, sec. 8. Township board of equalization: Procedure. 497.
 Chap. 184, sec. 5. Deputy county treasurer: Employment: Compensation. 346.
 Chap. 185. Attorney's fees: Law not retroactive. 585.
 Chap. 211, sec. 1. Insurance agent: Who is agent of company. 178.

LAWS OF 1884.

Chap. 198. Courts at Avoca. 758 *et seq.*

LAWS OF 1886.

Chap. 13. Bridges over boundary rivers: Powers of cities. 643.
 Chap. 17. Muscatine Island levee: Curative act: Constitutionality. 515 *et seq.*; 612.
 Chap. 42. Number of grand jurors: Constitutionality. 194 *et seq.*
 Chap. 66. Liquor nuisances: Attorney's fees: Application to pending suits. 533, 534.
 Chap. 66, sec. 12. Intoxicating liquors: Fines: Liens on real estate. 451.
 Chap. 83. Intoxicating liquors: Unlawful sale by druggist: Punishment. 137; Necessity of permit. 200.
 Chap. 98. Bridges over boundary rivers: Powers of cities. 643.
 Chap. 184. Abolition of circuit court. 758 *et seq.*
 Chap. 189. Levees: Assessment of cost: Appeal. 614.

CONSTITUTION OF IOWA.

Art. 1, sec. 9. Contempt: Right to jury trial. 294.
 Art. 1, sec. 11. Indictment by grand jury: How many must concur. 195.
 Art. 3, sec. 30. Special legislation. 522.
 Art. 4, sec. 16. The pardoning power. 415.
 Art. 5, sec. 6. District court at Avoca: Limited jurisdiction. 758 *et seq.*
 Amendment of 1884. Number of grand jurors. 195 *et seq.*

STATUTE OF LIMITATIONS.

AGREEMENT TO SUPPORT FOR LIFE. An action for a breach of an agreement to support plaintiff for life is not barred by the statute of limitations during plaintiff's life. The length of time for which recovery may be had is a different question, not arising in this case. *Riddle v. Beattie*, 169.

2. **FRAUDULENT CONVEYANCE: CONSTRUCTIVE NOTICE OF.** An action to set aside a fraudulent conveyance is barred in five years after the fraud is discovered, and it will be presumed to be discovered when the fraudulent conveyance is filed for record, unless the plaintiff shows that the knowledge with which he is charged by the filing of the deed was unavailable as a basis for further inquiry leading to the discovery of the fraud. (*Laird v. Kilbourne*, 70 Iowa, 83, *explained and followed.*) *Hawley v. Page*, 239.
3. **FRAUD IN GUARDIAN'S DEED: WHEN DISCOVERED.** Fraud in the conveyance of a minor's land by his guardian, under order of court, is presumed to be discovered when the deed is filed for record; and the ward cannot maintain an action to set it aside, seven years after reaching his majority, and after it would otherwise be barred by the statute of limitations, on the ground that he did not sooner discover the fraud. (Compare *Laird v. Kilbourne*, 70 Iowa, 84.) *Francis v. Wallace*, 873.
4. **AS TO RECOVERY OF TAXES ERRONEOUSLY PAID.** See taxes, 2, 4.
5. **AS TO RIGHT TO REDEEM FROM MORTGAGE FORECLOSURE.** See mortgages, 10.

See ESTATES OF DECEDENTS, 5; HIGHWAYS, 1.

STREETS.

1. **TITLE TO: EVIDENCE.** See Cities and Towns, 1.
2. **PURCHASE OF LAND FOR: COLLUSION AND FRAUD: PRESUMPTION.** See Cities and Towns, 3-6.
3. **OBSTRUCTION OF.** See Criminal Law, 19, 20.

SUPREME COURT.

JURISDICTION OF. See Appeal, 1-12; Practice in Supreme Court, 1, 2.

SURETIES.

DISCHARGE: AGREEMENT TO LOOK TO PRINCIPAL ALONE: CONSIDERATION: ESTOPPEL. Defendant, as surety for L., signed the note in question, and the payee knew that defendant was only a surety. The parties then all lived in Illinois. After the maturity of the note, defendant was about to remove to Iowa, and, at his request, his wife called on the payee of the note and requested him to release defendant from liability thereon, and he then promised to look to L. alone for payment, and stated that defendant need give himself no further concern about it. This promise was communicated to defendant, and he heard nothing further about it until some eight years afterwards. At that time L. had an abundance of property, but is now insolvent. *Held*, that these facts did not discharge defendant from liability on the ground of an estoppel, because the payee made no statement or representation as to existing facts, but a mere promise as to the future; and that the promise did not discharge him, because it was without any consideration. *Auchampaugh v. Schmidt*, 13.

See JUDICIAL SALES, 1.

TAXATION.

1. **REDUCTION OF ASSESSMENT BY SUPERVISORS: DUTY OF AUDITOR: REMEDY OF TAX-PAYER: MANDAMUS.** Where the board of supervisors, acting as a board of equalization, directs that the assessed value of realty in a certain town be reduced a certain per cent., and the county auditor fails and refuses, upon demand, to enter the property in said town in the tax-lists at the reduced and equalized assessment, owners of real estate in the town, who have not yet paid their taxes, may proceed against the auditor by *mandamus* to compel him to comply with the law in that regard. (See Code, secs. 832, 836, 837.) He has no discretion in the matter, and the tax-payers are not deprived of the remedy by *mandamus* on the ground that they have an adequate remedy at law or by injunction; for those remedies would not afford the relief sought, and to which they are entitled, to-wit, the correction of the tax-list. *Ridley v. Doughty*, 226.
2. **EQUALIZATION: PROCEEDINGS OF BOARD: JURISDICTION.** Where the board of equalization, at its first meeting, "changed" the assessment of plaintiff upon personal property, moneys and credits from fifteen dollars to fifty-three hundred and thirty-four dollars, and the assessment was then changed in the assessment book accordingly, and the board then adjourned for twelve days, and on the second day after adjournment the clerk of the board posted notices as provided by statute, showing the action of the board in raising certain assessments, including that of plaintiff, and advising all parties that the board would, on the day to which it had adjourned, naming it, meet "for the purpose of hearing grievances why the within assessments should not be raised," and plaintiff saw this notice, and had such knowledge as a full inspection thereof would convey, but he failed to appear on the day named to object to the raising of his assessment, and the assessment, without further action, was left as changed, *held* that plaintiff could not complain thereof, on the ground that the board had no right or authority to change the assessment at the first meeting, nor until after opportunity had been given to make objections thereto; for while the statute (Laws of 1880, chap. 9, sec. 3) contemplates only a preliminary investigation and not final action at the first meeting, the action in this case was not designed to and did not cut off plaintiff's right to object and to have a full hearing before final action was taken; and the fact that the entry was made at the first meeting was at best but an irregularity not affecting a substantial right, and not avoiding the proceeding. *Rockafellow v. Board of Equalization*, 493.
3. **OF UNPLATTED LANDS IN CITY LIMITS.** A tract of eighteen acres, owned by the plaintiff in the defendant city, occupied by plaintiff as his homestead, with the intention of so occupying it indefinitely, and not subdivided by streets or alleys, but surrounded on all sides by land which is platted for city purposes, and having all the benefits of light, water, streets, street railroads and fire protection common to that portion of the city, is subject to taxation for city purposes. (*Fulton v. City of Davenport*, 17 Iowa, 404, and *Brooks v. Polk County*, 52 Iowa, 460, followed.) *Perkins v. City of Burlington*, 553.
4. ———: **CHAPTER 47, LAWS OF 1876: INTERPRETATION.** In chapter 47, Laws of 1876, authorizing cities and towns to enlarge their limits in the manner therein prescribed, the language used in section four, to the effect that "no lands included in said extended limits which shall not have been laid off into lots of twenty acres, or less * * * shall be taxable for any city purpose," etc., refers only to lands taken in by the extension, and were not designed to affect the taxation of lands lying within the former limits. *Id*

5. **LEVY OF SPECIAL TAX UNDER CURATIVE ACT.** See Former Adjudication, 2.

See LEVEES, 1, 2.

TAXES.

1. **PAYMENT UNDER CLAIM OF TITLE UPON ANOTHER'S LAND: RECOVERY.** In an action to quiet title against one who claims title under a judicial sale which is adjudged to be void, and who has paid the taxes on the land under such claim, the decree quieting the title in plaintiff should award defendant judgment for the money so paid, with six per cent. interest on the several payments, and the same should be made a lien on the land. *Cassidy v. Woodward*, 854.
2. **ILLEGAL: PAYMENT: RECOVERY: LIMITATION OF ACTION.** Where illegal taxes are paid, as to an action for their recovery the statute of limitations ordinarily begins to run from the time of payment. (See opinion for citations.) *Eyerly v. Supervisors of Jasper County*, 470.
3. **IN AID OF RAILROADS: COUNTY TREASURER IS TRUSTEE.** Where money is paid into the county treasury under the provisions of the law for voting taxes in aid of the construction of railroads, such money in the hands of the treasurer is a trust fund, and the taxpayer and the railroad company are both beneficiaries. (Compare *Des Moines & M. Ry. Co. v. Lowry*, 51 Iowa, 486.) *Id.*
4. **———: PAYMENT: SUBSEQUENT DECREE OF INVALIDITY: RECOVERY: LIMITATION OF ACTION.** Where taxes voted in aid of the construction of a railroad were paid, and soon thereafter a suit was begun by the payers and others against the railroad company to test the validity of the tax, and it was subsequently decreed to be invalid, *held* that while such action was pending the statute of limitations did not run against an action of *mandamus* to compel the supervisors of the county to order a refunding of the tax so paid. *Id.*
5. **EQUALIZATION OF.** See Taxation, 1, 2.
6. **PAYMENT OF: EVIDENCE.** See Tax Sales and Deeds, 5.

TAX SALE AND DEED.

1. **FRAUD IN OBTAINING TAX TITLE: SUBSEQUENT PURCHASER WITH NOTICE: EQUITABLE REDEMPTION.** Defendant, believing that the title to his land was uncertain, and that it might be strengthened by a tax title, allowed it to go to tax sale and deed, under an arrangement with one W. that he should buy it and take a tax deed, and afterwards convey it to defendant. W. did buy it at tax sale, but he assigned the certificate to his brother M., which fact was concealed from defendant until after M. had taken a deed and defendant had paid W. the amount necessary to redeem the land; after which W. removed from the state, and left defendant at the mercy of M. The evidence (see opinion) justifies the conclusion that W. and M. conspired together to cheat defendant through the confidence which he had reposed in W., who seems to have been a somewhat intimate friend of defendant. The land was sold at tax sale for \$51.35, and is shown to be worth seven thousand dollars. M. refused to convey it to defendant unless he would pay him two thousand dollars. About one year latter M. sold the land to plaintiff, through plaintiff's attorney, who had full knowledge of the fraud, for sixteen hundred dollars,—five hundred dollars of which was to be paid to the attorney as a fee for recovering possession of the land, which plaintiff knew was occupied by defendant, or some one, adversely to the title which he was purchasing. *Held—*

- (1) That the tax title in the hands of M. was void for fraud, and that it could not prevail against the defendant's title.
 - (2) That plaintiff was bound by his attorney's knowledge of the fraud, and therefore he acquired by his purchase no better right than M. had.
 - (3) That if it were conceded, as claimed by plaintiff, that the attorney was not at the time of the purchase his attorney or agent, yet the circumstances of the transaction were such as to put plaintiff upon inquiry as to defendant's equities, which would have led to a full knowledge of the fraud, and that therefore he must be charged with such knowledge.
 - (4) That since the evidence shows that W. was at least the agent of M. in all matters pertaining to the tax purchase and redemption, he had authority to bind M. by the receipt of the redemption money from defendant, and to contract that redemption should be made in a manner and at a time different from that prescribed by statute. And M. having thus received the money which he agreed to accept in discharge of his tax title, pursuant to a valid agreement before entered into, equity will not permit that title to be enforced against defendant. (See *Shoemaker v. Porter*, 41 Iowa, 197.) *Leas v. Gaverich*, 275.
2. **FOR DELINQUENT TAXES NOT CARRIED FORWARD: INVALID.** The sale of land for delinquent taxes not carried forward on the tax books, as required by section 845 of the Code, is invalid. (See opinion for citations.) *Sac County Bank v. Hooper*, 485.
 8. ———: **VALIDATION BY TIME: FORMER ADJUDICATION.** Where a party has a tax title based upon a sale of land for delinquent taxes not carried forward, and therefore invalid (Code, sec. 845), and he conveys by warranty deed, and his grantee buys in the patent title and sues him for a breach of warranty and recovers, that is an adjudication that the patent title is superior to the tax title, and the grantor cannot, after a few years, be heard to claim that his tax title has now, by the lapse of time, ripened into a perfect title, and ask to have it quieted against his grantee. The adjudication cut off all claims based on or growing out of the title decreed to be invalid. *Id.*
 4. **DELINQUENT TAX NOT BROUGHT FORWARD: WHEN NOT REQUIRED.** Under section 845 of the Code, a sale of land for taxes of a prior year is invalid if the delinquent tax is not entered by the treasurer on the tax book of the year in which the sale is made. But the rule does not apply to a case where the treasurer has not, at the time of making the sale, received the tax books from the auditor for the year of the sale. And in this case, where the treasurer received the tax books on the day of the sale, but it is not shown that he received them before the sale had been made, and it appears that the books for some of the townships were in the auditor's hands after the sale had closed, *held* (in view of the presumption which must be indulged that an officer has done his duty) that the tax sale could not be regarded as invalid for the failure of the treasurer to comply with the statute in this respect. *Babcock v. Bonebrake*, 710.
 5. **PRIOR PAYMENT OF TAXES: EVIDENCE: PRESUMPTION.** Plaintiff, in order to show that, prior to the sale of his lot for taxes, he had paid the very tax for which it was sold, proved that he had applied to the treasurer for a statement of the taxes due on all his property, consisting of more than one hundred lots, and that, upon

receiving his report, he sent by express the amount of money indicated to pay all the taxes. He also produced a tax receipt, showing the payment of the tax on the lot in question, together with five other lots. But the stub of the receipt, which remained in the treasurer's office, showed payment on five of the lots only, omitting the one in question. *Held* that the stub, being a mere memorandum, could not overcome the receipt; also, that it was more rational to presume that the treasurer made a mistake in omitting the lot from the stub, than that he neglected to apply the money sent by plaintiff to the purpose for which it was intended. *Bright v. Slocum*, 27.

6. **PURCHASE BY AGENT: WHETHER GOOD AS AGAINST PRINCIPAL: BURDEN OF PROOF AS TO PRINCIPAL'S INTEREST.** Plaintiff purchased the land in question at tax sale when he was the attorney and agent of the defendant B. in such a sense that, had the legal title of the land been in B. at the time of the sale, plaintiff's tax deed, subsequently taken, would have given him title only in trust for B. But the title was at the time in one V., and B.'s claim as against the tax title is based upon an alleged equity in the land, which did not exist if V. was an innocent purchaser; and it seems to be conceded that plaintiff, when he purchased at tax sale, was of the opinion that V.'s title was good, and that B.'s equity was irretrievably gone. *Held* that whether plaintiff's tax title was good as against B. depended upon the question whether B.'s equity was *in fact* gone when plaintiff purchased, and that his relation to B., as attorney and agent, placed upon him the burden to show that V.'s title was good, and that B.'s equity *was* in fact divested thereby; and, having failed to establish these facts by the evidence, in an action by him to quiet his tax title, a decree for defendants was properly entered. *Prouty v. Bullard*, 42.
7. **PURCHASE OF PART OF TRACT FOR WHOLE TAX: FORM OF BID: VALIDITY.** Section 876 of the Code provides that when a "purchaser (at tax sale) shall designate the portion of any tract of land or town lot for which he will pay the whole amount of taxes assessed against such tract or lot, the portion thus designated shall, in all cases, be considered an undivided portion." In these cases it appears from the tax-sale record, which is the authoritative record of the sales, that the bids were made upon fractions of the tracts, as one-twentieth and one-eightieth. *Held* that the law would regard the sales as of undivided interests, and valid, though the list of lands advertised for sale showed that the bids were for "two acres" and "one-half acre." (*Brundige v. Maloney*, 52 Iowa, 218; *Poindexter v. Doolittle*, 54 Iowa, 52, distinguished.) *Jenswold v. Doran*, 692.
8. **——: ONE NOTICE TO REDEEM FROM TWO SALES.** A purchaser at tax sale purchased one fraction of a tract of land for the taxes of one year, and the other fraction, and the whole of another tract, for the taxes of the next year. His notice to redeem recited the two sales of the several fractions, and the purchase of all of the other tract by the same person, but it was single as to the purchaser and person in whose name the land was taxed. It was addressed to the proper person and was properly served. *Held* that it was not invalid because it covered more than one sale and certificate, and more than one tract. (*White v. Smith*, 68 Iowa, 813, and *Adams v. Burdick*, 68 Iowa, 666, distinguished.) *Id.*

9. NOTICE TO REDEEM: AMENDED PROOF OF SERVICE: WHEN AND BY WHOM MADE. Where the purchaser of land at tax sale gave due and timely notice to redeem, but the proof thereof which he filed in the treasurer's office was defective, but he received a treasurer's deed for the land, and afterwards quitclaimed it, and it passed through several parties to W., it having in the meantime been improved and occupied by the grantees of the purchaser, but the purchaser never at any time assigned the certificate of purchase, *held* that, under section 894 of the Code, he was the proper person, though he had conveyed the land, to file proper proof of the service of the notice to redeem, which had been originally given, and to receive a new treasurer's deed for the land. Especially is it so held where W. and all the grantors in her chain of title, including the tax purchaser, join in asking that their tax title be confirmed as against the claimant under the patent title. (Compare *Rice v. Bates*, 68 Iowa, 398.) *Babcock v. Bonebrake*, 710.
10. ———: IMPERFECT PROOF OF SERVICE: DEFECT CURED: PRIOR OCCUPANCY UNDER INVALID DEED: RENTS AND PROFITS: EQUITIES. Where there was due and timely notice to redeem from a tax sale, but imperfect proof of the service of such notice, but a deed was made to the purchaser, and his grantees took possession and cultivated and improved the land for some years, and meanwhile legal proof of the service of the notice was filed, and no redemption was made within ninety days thereafter, and a new deed was made by the treasurer upon such proof, and, only a few weeks prior to the time when the tax title would have been perfected by the statute of limitations, plaintiffs brought this action to redeem, *held* that their right was cut off by their failure to redeem under the second proof of service (*Long v. Smith*, 62 Iowa, 831), and that they could not claim that redemption had before that been made in equity by the rents and profits of the land which had been enjoyed by the holders under the tax title—the rental value of the premises having been created almost wholly by the improvements which they had made. *Id.*

TENANCY IN COMMON.

See REAL ESTATE, 1.

TENDER.

See VENDOR AND VENDEE, 1.

TOWNSHIP CLERK.

RECORDS OF: EVIDENCE. See Evidence, 16.

TOWNSHIP TRUSTEES.

1. POWERS: SALE OF UNUSED CEMETERY GROUND: CONDITIONS ATTACHED. Township trustees are constituted a board of health, and have charge of all cemeteries within the limits of their township, dedicated to public use, and not controlled by trustees or other corporate bodies,—Code, section 393,—and by section 415 they are empowered to make regulations for the protection of the public health, and respecting nuisances, sources of filth, and causes of sickness in their respective townships. Under these sections, *held* that township trustees, being about to sell ground purchased for cemetery purposes, but which they regarded as unfit to be used for such purpose, could not be enjoined from selling on the ground that they proposed to sell only upon condition that the ground should not be used for a private or public cemetery, and that, upon an attempt to so use it, it should be forfeited back to the trustees and their successors in office. *Bushnel v. Whitlock*, 285.

2. JURISDICTION OF IN CASE OF TRESPASSING ANIMALS. See Animals, 1.
3. AS BOARD OF EQUALIZATION : JURISDICTION. See Taxation, 2.

TRESPASS.

1. MAKING HAY ON WILD LAND : GOOD FAITH : DAMAGES. Defendant purchased the right to make hay on plaintiff's wild land of one whom he believed to be authorized to sell such right, but who had in fact no such authority. The uncut grass was worth not more than ten cents per acre, while the hay made from an acre was worth three or four dollars. Defendant acted in entire good faith, and cut no more grass after he was informed that he was proceeding without the owner's authority. Plaintiff sought to recover, not the value of the grass, but of the cured hay. *Held* that he could not so recover. (See opinion for cases cited.) *Lewis v. Court-right*, 190.
2. TRESPASSING ANIMALS. See Animals, 1, 2; Evidence, 16.

TRUSTS.

1. WHAT IS NOT. Plaintiff conveyed real estate to T. in consideration of T.'s agreement to furnish support to plaintiff during life, and afterwards, by agreement between plaintiff and T. and defendant, T. conveyed the land to defendant, who assumed the obligation to furnish support to plaintiff. *Held* that by these transactions no trust was created as between plaintiff and T., or plaintiff and defendant. *Riddle v. Beattie*, 168.
2. ASSIGNMENT TO SECURE TRUSTEE AND OTHERS : DUTY OF TRUSTEE. N. was indebted to the defendant bank, and to plaintiffs, and to C., S. & Co., and he assigned a policy of insurance, on which loss had occurred, to the bank, authorizing it to collect the policy and apply the proceeds, first in payment of his debt to it and expenses of collection, and to hold the balance subject to his order. He afterwards gave C., S. & Co. an order on the bank for what he owed them, which order was accepted, and then gave plaintiffs a like order for their claim, which the bank also accepted, subject, however, to be paid after the bank's claim and that of C., S. & Co. were satisfied. *Held* that the bank owed to plaintiffs no more than ordinary diligence in collecting the policy, and that it was justified in settling an action on the policy for less than half the amount thereof, and less than N.'s debt to it, thereby leaving nothing to pay plaintiff's claim, where the probability was that the action, if prosecuted, would be defeated; and that the plaintiffs especially could not complain, since they were informed of the impending settlement, and made no proposition to prosecute the suit. *Meyer v. Farmers & Traders' Bank*, 388.
3. DEED OF : VALIDITY : TESTAMENTARY IN CHARACTER : GIFT INTER VIVOS. A written instrument transferring personal property to a trustee, who is charged to pay the income therefrom, after defraying expenses, to the grantor so long as she lives, and to make such investments in real estate as she may direct, and at her death to distribute the property in equal shares among her children, is not invalid as being a gift *inter vivos* without delivery, nor as being a testamentary disposition of property not executed as required by law, but is a deed of trust operating *in præsenti*, and therefore valid. *Forney v. Remey*, 549.
4. TRUSTEE'S RIGHT TO SUE. See Parties to Actions, 2.
5. COUNTY TREASURER IS TRUSTEE FOR RAILROAD TAXES COLLECTED. See Taxes, 3.

See ATTORNEYS AT LAW, 1.

ULTRA VIRES.

See CITIES AND TOWNS, 6.

VENDOR AND VENDEE.

1. **ABSOLUTE OR OPTIONAL SALE : BREACH : PLEADING AND EVIDENCE : TENDER.** Where there is an absolute sale of land with an agreement to convey upon a certain day upon payment of the price, but before that day the vendor conveys it to another, and thus puts it out of his power to convey to the vendee, the latter, in an action for damages, need not allege nor prove that he was able and offered to perform on his part on the day named ; but if the agreement was a mere option to the vendee to purchase, or if the conveyance to the third party was conditional, so that it was not out of the power of the vendor to convey to the vendee, and the vendee was informed of that fact, then, to give the vendee a right of action, he must have tendered performance on his part on the day named. *Damon v. Weston*, 259.
2. **VALUE OF LAND : CROSS-EXAMINATION.** Where a witness has testified to the value of land on a certain day, it is proper cross-examination to ask him what it is worth at the time of trial, for the purpose of showing the value of his opinion. *Id.*
3. **FAILURE TO CONVEY : EVIDENCE.** In an action for a breach of contract to convey, where the defendant had conveyed to another prior to the day set for payment by and conveyance to plaintiff, defendant was properly permitted to show a verbal promise on the part of his grantee to reconvey, and there was no error in refusing to allow plaintiff to show that the grantee had not placed his deed in escrow. *Id.*
4. **SPECIFIC PERFORMANCE : ACCEPTANCE NOT IN TERMS OF OFFER.** Specific performance will not be decreed where there is uncertainty, ambiguity or doubt respecting the contract. (See opinion for authorities.) And so, where defendant wrote to plaintiff : " Will give a warranty deed as title now stands at eight dollars per acre net to me," and plaintiff replied : " We accept your offer without qualification. * * * Notify us when and where to send money. We understand, of course, that you have L.'s title, and that you will place the same on record," *held* that the acceptance was not an unconditional one in the terms of the offer, and therefore that there was no contract to be enforced. (Compare *Sawyer v. Brossart*, 67 Iowa, 678.) *Batie v. Allison*, 313.
5. **RESCISSION OF CONTRACT : FAILURE OF TITLE.** H. was in possession of land under a contract of purchase from D., and, representing himself to be the owner of it, he sold it to plaintiffs, taking their notes for the price, and plaintiffs went into possession, and their possession was never disturbed nor questioned. T. afterwards became the owner of both contracts, and was able, ready and willing to carry out the contract with plaintiffs. *Held* that plaintiffs could not have their contract rescinded on the ground of the false representations of H. as to the ownership, since they had suffered no injury therefrom. *Simmons v. Hill*, 378.
6. **BREACH OF WARRANTY : WHEN RECOVERY MAY BE HAD.** It is the rule in this state that, to authorize recovery upon a breach of warranty in a deed, actual ouster of the warrantee need not occur, but that there will be constructive eviction when the superior title is asserted in hostility to the title under which the warrantee holds the land. (See opinion for citations.) *Sac County Bank v. Hooper*, 485.

7. **FAILURE OF CONSIDERATION : INSTANCE.** Plaintiff deeded lands to defendant in consideration of defendant's deeding to him other lands, and of defendant's promise to erect valuable improvements on his other lands adjoining those deeded to plaintiff, whereby those deeded would be enhanced in value. *Held* that a failure to make such improvements was a failure of consideration for which plaintiff could maintain an action. *Wilson v. Yocum*, 569.
 8. **FALSE REPRESENTATIONS : INSTANCE.** Defendant induced plaintiff to make an exchange of lands with him by falsely representing that a railroad was about to be built with a depot near the lands deeded to plaintiff, and that the railroad company had purchased a large tract of land lying near to the land so conveyed, and that he had his information from the manager of the road. *Held* that these representations were not the mere statements of opinion, but the assertion of pretended facts, and that an action would lie for the recovery of the damages sustained by the fraud. (See opinion for citations.) *Id.*
 9. **FAILURE OF CONSIDERATION : SPECULATIVE DAMAGES : WHAT ARE NOT.** Where defendant exchanged real estate with plaintiff, and as a part of the consideration for the land deeded by plaintiff he agreed to make certain valuable improvements upon lands adjoining those conveyed to plaintiff, but failed to do so, and plaintiff, in an action to recover for the failure, alleged that the lands conveyed by him were worth eight thousand dollars, and that the lands conveyed to him, with the improvements made as agreed, would have been worth eight thousand dollars but without them were worth only three thousand dollars, *held* that his damages, as shown by his petition, were actual and not speculative, and that an action would lie therefor. (*McDole v. Purdy*, 23 Iowa, 278, *followed*; *First Nat. Bank v. Thurman*, 69 Iowa, 693, *distinguished*.) *Id.*
 10. **DEFECTIVE CONVEYANCE : NOTICE : BAD FAITH.** Where land is conveyed with an acknowledgment which is not good in this state, subsequent purchasers and mortgagees, claiming under a second deed from the same grantor, who have actual notice of the prior conveyance, and who part with no value in acquiring their pretended title and interest, take nothing as against those claiming under the first deed. *Walker v. Abbey*, 702.
 11. **AS TO PURCHASES OF LAND AT JUDICIAL SALES.** See Attachment, 6, 8; Judicial Sales, 1; Homesteads, 4, 5.
 12. **WHETHER GROWING CROPS PASS WITH LAND.** See Chattel Mortgages, 8, 4.
- See REAL ESTATE, 2, 4; SPECIFIC PERFORMANCE, 1; TAX SALE AND DEED, 3; FRAUDULENT CONVEYANCE.

VENUE.

1. **CHANGE OF IN CRIMINAL CASES.** See Criminal Law, 4-7.
2. **CHANGE OF BY AGREEMENT.** See Courts, 1, 2.

VERDICT.

1. **FOR MORE THAN CLAIMED : PLEADING AND PRACTICE.** Where only one hundred and forty dollars was claimed, a verdict for one hundred and fifty dollars was not authorized; but when defendant moved to reduce the verdict to one hundred and forty dollars and the interest, and the interest was about ten dollars, judgment should have

been entered for one hundred and fifty dollars; and it was error to allow plaintiff, after verdict, to file an amendment to his petition alleging his damages to be one hundred and fifty dollars, instead of one hundred and forty dollars, the amount originally claimed, *Cox v. Burlington & W. Ry. Co.*, 478.

2. **EVIDENCE TO SUPPORT: ACCEPTANCE OF DRAFTS: SETTLEMENT.** A railroad company of which plaintiff was president drew drafts on the defendant in favor of the plaintiff, which defendant accepted. In an action on the drafts, it appeared that plaintiff, as president of the railroad company, made a demand upon the defendant for settlement for bonds sold; and the evidence tended to show that the defendant was then owing the railroad company on account of bonds much more than the amount of the drafts, and that the drafts were given in settlement. *Held* that a general verdict for plaintiff, and a special finding that the drafts were accepted in settlement of a disputed claim made by the railway company, and that defendant had not paid that company the amount due for its bonds, were sufficiently supported by the evidence. *Gafford v. American Mortgage & Investment Co.*, 736.
3. **DIRECTION BY COURT.** See Insurance, 4, 5; Replevin, 1; Sales, 2.
4. **AS AFFECTED BY REMARKS OF COURT.** See Practice and Procedure, 1, 5.
5. **EXCESSIVE VERDICT.** See Railroads, 7; Seduction, 2.
6. **AGAINST EVIDENCE AND INSTRUCTION.** See Insurance, 6; Intoxicating Liquors, 3.

WARRANTY.

1. **OF SOUNDNESS OF ANIMALS SOLD.** See Sales, 1.
2. **OF TITLE TO LAND: BREACH: ACTION.** See Vendor and Vendee, 6.

WATERS.

1. **DIVERSION: RIGHTS OF ADJOINING OWNERS: PRESCRIPTION.** Where one of two adjoining owners of land turns the water from his land, whether it be mere surface water or not, upon the land of his neighbor, he does not, by the mere use of the water in that way for ten years, acquire the right to continue to so use it (see Code, sec. 2031, and cases cited in opinion), and he cannot complain if his neighbor seeks to protect his land by draining the water to a point where it may possibly flow back again upon the land of him who first diverted it. *Preston v. Hull*, 309.
2. **RIGHTS OF UPPER AND LOWER OWNERS ON STREAM.** The lower owner of land upon a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome condition as a reasonable and proper use of the stream by the upper owner will permit. What is a reasonable use must be determined from the circumstances of the case. *Ferguson v. Firmenich Manuf. Co.*, 576.
3. **LIABILITY OF UPPER OWNER CONTRIBUTING TO POLLUTION.** Where the upper owner contributes to the pollution of a stream already polluted from above, but what he contributes makes the water unfit for stock, and charges it with noxious gases, when before it was fit for stock and free from such gases, he is liable to the lower owner in damages. (See *Platt v. Railway Co.*, 74 Iowa, 181; *Ewell v. Greenwood*, 26 Iowa, 377.) *Id.*

4. **POLLUTION BY BOTH UPPER AND LOWER OWNERS: LIABILITY.** The lower owner on a stream cannot recover of the upper owner for polluting it, when he himself pollutes it also, and thus contributes to the very injuries of which he complains. (See cases cited in opinion. *Id.*)
5. **POLLUTION OF STREAM BY UPPER OWNER: MEASURE OF DAMAGES.** Where the upper owner, by the unreasonable use of a stream, pollutes it so that the water, as it flows upon the farm below, is not only useless for stock and domestic purposes, but also is a source of sickness, pain and discomfort to the lower owner and his family, he is entitled to recover not only the difference in the rental value of the farm, on account of the nuisance, but also such special damage as he may have suffered, including that resulting from sickness, pain and discomfort. (See cases cited in opinion.) *Id.*
6. **NAVIGABLE LAKES: BRIDGES OVER.** See Counties, 8.

WILLS.

1. **CONSTRUCTION: DUTY OF DISTRICT COURT.** In a cause involving the construction of a will as between the widow and the other legatees and devisees of decedent, where the widow claimed a fee in the real estate and absolute ownership of the personal property under the will; and the others claimed that she was entitled to a life estate only in each, *held* that it was the duty of the court to determine the question thus raised, and that it was error to find and adjudge only that which was conceded, viz., that she was entitled to hold and control all the property during her life. *Bills v. Bills*, 179.
2. **CONSTRUCTION: JURISDICTION OF SUPREME COURT.** See Appeal, 12.
3. **TESTAMENTARY DISPOSITION OF PROPERTY BY DEED: WHAT IS NOT.** See Trusts, 3.

WITNESSES.

1. **COMPETENCY: PERSONAL TRANSACTION WITH DECEDENT.** In an action by an administrator against one of the joint makers of a promissory note given to his intestate, the wife of the defendant was a competent witness on behalf of the defendant, under section 8641 of the Code, to prove that he signed the note as surety only. (*Auchampaugh v. Schmidt*, 72 Iowa, 756, *overruled*.) *Auchampaugh v. Schmidt*, 18. See, also, Evidence, 18.
2. **CREDIBILITY: ERRONEOUS INSTRUCTION.** See Criminal Law, 18.
3. **IMPEACHMENT OF BY LETTERS.** See Evidence, 12.

See, also, Evidence, 18.

